(24)

No. 93-377-CFX
Status: GRANTED

Title: Department of Taxation and Finance of New York, et al., Petitioners
v.
Milhelm Attea & Bros., Inc., etc., et al.

Docketed:
September 7, 1993

Court: Court of Appeals of New York

Counsel for petitioner: Boone,Jerry

Counsel for respondent: Holmes,Johnny B., Huttash,Robert, Zdarsky,Joseph E.

Entry	Date	Note	Proceedings and Orders
1	Sep 7 1993	G	Petition for writ of certiorari filed.
3	Oct 5 1993	G	Motion of Empire State Petroleum Association, Inc. for leave to file a brief as amicus curiae filed.
4	Oct 5 1993	G	Motion of New York State Association of Tobacco and Candy Distributors for leave to file a brief as amicus curiae filed.
2	Oct 6 1993		Brief of respondents Milhelm Attea & Bros., et al. in opposition filed.
5	Oct 6 1993	G	Motion of Seneca Nation of Indians, et al. for leave to file a brief as amici curiae filed.
6	Oct 13 1993		DISTRIBUTED. October 29, 1993 (Page 14)
7	Nov 1 1993		Motion of Empire State Petroleum Association, Inc. for leave to file a brief as amicus curiae GRANTED.
8	Nov 1 1993		Motion of New York State Association of Tobacco and Candy Distributors for leave to file a brief as amicus curiae GRANTED.
9	Nov 1 1993		Motion of Seneca Nation of Indians, et al. for leave to file a brief as amici curiae GRANTED.
10	Nov 1 1993		Petition GRANTED.
			**********
11	Dec 9 1993		Joint appendix filed.
12	Dec 14 1993		Brief of petitioners Dept.of Taxation and Finance of the State of New York, et al filed.
13	Dec 14 1993		Brief amici curiae of Empire State Petroleum Association, et al. filed.
15	Dec 15 1993		Brief amicus curiae of New York State Association of Tobacco and Candy Distributors filed.
17	Dec 15 1993		Brief amicus curiae of Connecticut filed.
18	Dec 15 1993		Brief amici curiae of Washington, et al. filed.
14	Dec 16 1993		Brief amici curiae of National Association of Convenience Stores, et al. filed.
16	Dec 16 1993		Brief amici curiae of National Governors' Association, et al. filed.
29	Dec 29 1993	P	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Jan 18 1994		Brief amicus curiae of Oneida Indian Nation of New York filed.
20	Jan 18 1994		Brief amici curiae of Saint Regis Mohawk Tribe, et al. filed.
21	Jan 18 1994		Brief amicus curiae of Seneca Nation of Indians filed.

app

No. 93-377-CFX

Entry	Date	Note	Proceedings and Orders
22	Jan 18 1994		Brief amicus curiae of United States filed.
23	Jan 18 1994		LODGING consisting of six documents submitted by the United States as amicus curiae.
24	Jan 18 1994		Brief of respondents Milhelm Attea & Bros., et al. filed.
25	Jan 18 1994		Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma, et al. filed.
26	Jan 18 1994		Brief amicus curiae of Muscogee (Creek) Nation filed.
27	Feb 2 1994		SET FOR ARGUMENT WEDNESDAY, MARCH 23, 1994. (2ND CASE).
30	Feb 3 1994		Record filed.
		*	Partial proceedings Court of Appeals of New York.
28	Feb 4 1994		CIRCULATED.
31	Feb 8 1994		Record filed.
		*	Certified proceedings Albany County, Supreme Court, New York (BOX)

(1)

93-377

No.

Supreme Court U.S.
FILED

SEP 7 1993

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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(3336—LC10-404—1993)

107 pp

Question Presented

Whether, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes from Indian retailers, the State of New York may require the retailers' cigarette suppliers to comply with regulations limiting the quantity of tax exempt cigarettes which can be purchased for resale at reservation outlets to an amount no greater than the maximum legitimate Indian consumption of the reservation, and imposing upon the suppliers minimal burdens relating to record keeping and reporting.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners, the Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, respectfully pray that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in these actions on June 10, 1993. The order of the Court of Appeals is set forth as Appendix "A".

The order of the Court of Appeals reversed an order of the Appellate Division, Third Department, which was rendered pursuant to an order of this Court, entered January 21, 1992 (Docket No. 91-907), in which this Court granted a petition for a writ of certiorari filed by petitioners, vacated the Appellate Division's prior order and remanded the case to the Appellate Division for further consideration in light of *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma* ("*Potawatomi*"), 498 US 505 (1991).

Opinions Below

The opinion of the Court of Appeals was rendered on June 10, 1993. The opinion is not yet reported. It is set forth as Appendix "B".

The opinion of the Appellate Division was rendered on July 9, 1992. The opinion is reported at 181 AD2d 210 (3d Dept 1992). It is set forth as Appendix "C".

The order of this Court granting petitioners' petition for a writ of certiorari and vacating the judgment of the Appellate Division, Third Department and remanding the case to the Appellate Division for further consideration in light of *Potawatomi* was entered on January 21, 1992. The order is reported at ___ US ___, 117 L Ed 2d 99, 112 S Ct 926 (1992). It is set forth as Appendix "D".

The original opinion of the Appellate Division, Third Department was rendered on December 6, 1990. The opinion is reported at 164 AD2d 300 (3d Dept 1990). It is set forth as Appendix "E".[1]

The opinion of the Supreme Court, Albany County, was rendered on June 5, 1989. The opinion is not reported. It is set forth as Appendix "G".[2]

Jurisdiction

The order of the Court of Appeals was entered on June 10, 1993. This petition for certiorari is filed within 90 days of June 10, 1993. The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

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[1]The original order of the Appellate Division is set forth as Appendix "F".

[2]The order and judgment of the Supreme Court, Albany County, is set forth as Appendix "H".

Statutory and Regulatory Provisions Involved

25 USC §§ 261-264; New York Tax Law §§ 471, 474, 481, 1814, 1846, 1847; 20 NYCRR §§ 335.6 and 335.7. These provisions are set forth in pertinent part as Appendix "I".[3]

Statement of the Case

A. Facts and Procedural Background

These cases involve questions of whether and to what extent federal law permits States to impose incidental burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of retail goods, here cigarettes, from retailers on Indian reservations. Respondent Milhelm Attea & Bros., Inc. ("Milhelm") is a licensed New York State cigarette tax agent and wholesale dealer of cigarettes (New York Tax Law §§ 470[6] & [9], 472, 480), a portion of whose business involves the wholesale sale of cigarettes to retailers on various Indian reservations in New York. Respondent Elias H. Attea, Jr. ("Elias") is also in the business of selling cigarettes at wholesale on Indian reservations but is not licensed as either a cigarette tax agent or wholesale dealer of cigarettes.

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[3]Effective December 19, 1990, 20 NYCRR 335.6 and 335.7, the regulations at issue, were renumbered 20 NYCRR 336.6 and 336.7 without any substantive change. In order to maintain consistency with the opinions rendered by the New York State courts, we will continue to employ the old numbering.

In December, 1988 Milhelm and Elias brought independent actions in the Supreme Court, Albany County seeking declaratory and permanent injunctive relief to enjoin the application to their businesses of certain regulations adopted by the Commissioner of Taxation and Finance in August, 1988. The regulations were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations located in New York State. It was the respondents' contention that they were federal Indian traders and that insofar as the new regulations imposed burdens upon their dealings with their Indian customers, the regulations were preempted by the Indian trader statutes. 25 USC § 261 *et seq.*

The challenged regulations are substantially similar to regulations adopted by the Commissioner of Taxation and Finance effective November 30, 1988 dealing with the sale and distribution of motor fuel in New York. In *State Tax Commn. of the State of New York v Herzog Bros. Trucking, Inc.*, 487 US 1212 (1988), this Court granted a petition for certiorari filed on behalf of the State Tax Commission and vacated and remanded to the New York Court of Appeals for further consideration, in light of the then proposed motor fuel regulations, a judgment of the Court of Appeals holding that the State's "pass on and collect" motor fuel tax scheme could not be applied to motor fuel distributors selling motor fuel at wholesale to Indian retailers because the Indian trader statutes, 25 USC § 261 *et seq.*, preempted the field of regulating trade with Indians. *Herzog Bros. Trucking, Inc. v State Tax Commn.*, 69 NY2d 536 (1987).

Following remand, the Court of Appeals adhered to its original decision. 72 NY2d 720 (1988). Because the regulations only applied to sales of motor fuel made after January 1, 1989, and it appeared that Herzog Brothers, Inc. would not continue to sell to Indians after that date, the court declined to consider the validity of the new regulations. The court correctly observed in this regard that to do so under the circumstances "would constitute an advisory opinion involving hypothetical future transactions of unknown parties". 72 NY2d at 725. The court did opine that "[i]n the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions [referring to *Central Machinery Co. v Arizona Tax Commn.*, 448 US 160 (1980), and *Warren Trading Post Co. v Arizona Tax Commn.*, 380 US 685 (1965)] and our application of them to the facts before us represents the present state of the law on the subject". 72 NY2d at 724-725.

On January 18, 1989 the Supreme Court, Albany County, granted a preliminary injunction as requested by the respondents. Petitioners served their answers on January 20, 1989, and each side thereafter moved for summary judgment. The Supreme Court (Cheeseman, J.) rendered its decision on June 5, 1989. Based on the authority of the Court of Appeals' decision in *Herzog Brothers Trucking, supra*, which the court found indistinguishable, the Supreme Court granted respondents' motions for summary judgment declaring the challenged regulations invalid with respect to their sales of cigarettes to Indians on Indian reservations in New York and denied in all respects petitioners' motion to dismiss or, in the

alternative, for summary judgment (A33-A43).[4] The court's order and judgment was entered on August 22, 1989.

Petitioners appealed, and by a unanimous decision dated December 6, 1990, the Appellate Division, Third Department affirmed (A19-A24). In the opinion of the Appellate Division the issues presented were similar to those considered by the New York Court of Appeals in *Herzog Brothers Trucking, supra*, upon which the Appellate Division deemed itself to be bound. The Court said in relevant part, "[a]ccordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals' interpretation of the applicable Supreme Court decisions" (A24).

Petitioners thereafter filed an appeal as of right to the New York Court of Appeals pursuant to New York CPLR 5601(b)(l). By an order dated May 9, 1991 the Court of Appeals dismissed petitioners' appeal *sua sponte*, upon the ground that no substantial constitutional question was directly involved. Petitioners' subsequent motion for leave to appeal to the Court of Appeals was denied without opinion by an order of the Court of Appeals entered on September 12, 1991.

On November 25, 1991, the petitioners filed a petition for a writ of certiorari. The basis upon which the writ was sought was that this Court's decision in *Potawatomi*, which was

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[4]Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix.

decided by the Court some two months after the Appellate Division rendered its original decision, made clear that this Court intended its decisions in *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), and *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), to be read as affirming the right of the States, notwithstanding the Indian trader laws, to exercise some regulatory authority over Indian traders as an aid to the enforcement of their tax laws. On January 21, 1992 this Court granted petitioners' petition for a writ of certiorari, vacated the Appellate Division's prior order and remanded the case to the Appellate Division for further consideration in light of *Potawatomi* (A17-A18).

On July 9, 1992 the Appellate Division rendered its decision on remand (A13-A16). The Appellate Division observed that while the precise issue of federal preemption presented in this case was not directly before this Court in *Potawatomi*, this Court nevertheless had explicitly addressed the issue in response to a concern by the State of Oklahoma that because of the Indian Tribe's sovereign immunity it would be unable to enforce its tax scheme to collect sales tax from non-Indians doing business at tribal stores. The Appellate Division quoted from this Court's opinion in *Potawatomi* the Court's observation that "under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores". *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 US at 514. From this the court concluded that this Court was of the view that not all

burdens placed on Indian traders by States attempting to enforce tax schemes aimed at taxing sales by Indian retailers to non-Indians made on reservations was impermissible (A15). The court then said (A15-A16):

> "The Supreme Court's observations call into question the continued validity of the legal analysis underpinning the Court of Appeals' decision in *Herzog Bros. Trucking v State Tax Commn.* (69 NY2d 536, *vacated* 487 US 1212) and again considered by that court upon remand from the Supreme Court and which opinion was the legal underpinning for our holding in this matter (164 AD2d 300, *supra*).
>
> "We now hold that minimal burdens such as are prescribed by the tax scheme promulgated pursuant to 20 NYCRR 335.5 upon Indian traders in collecting sales taxes on sales by Indian retailers to non-Indian purchasers made on Indian reservations are not barred by Federal preemption of the field of regulating trade with Indians (*see*, 25 USC 261 *et seq*)."

The Appellate Division accordingly reversed the order and judgment of the Supreme Court, denied respondents' motions for summary judgment, granted petitioners' cross-motions for summary judgment and declared that the challenged regulations had not been shown to be unconstitutional. Respondents thereafter appealed.

By a decision rendered on June 10, 1993, the Court of Appeals reversed (A3-A12). The Court of Appeals held that the challenged regulations imposed obligations upon wholesale Indian traders and were therefore preempted by federal law (A7). The Court of Appeals read this Court's direction in *Potawatomi* that "States may of course collect the sales tax from cigarette wholesalers * * * by assessing wholesalers who supplied unstamped cigarettes to the tribal stores", 498 US at 514, as "indicat[ing] that the method might somehow be used to retroactively collect taxes unpaid on past sales" (A11). However, the court declined to read the quoted language as establishing the right of States to impose even minimal regulatory burdens on wholesalers supplying Indian retailers as an aid to enforcement of valid State tax laws (A11). The court said in this regard (A10):

> "* * * we do not interpret the Supreme Court's statement [in *Potawatomi*] as altering the established rule stated in *Warren Trading Post Co. v Arizona Tax Commn* (*supra*, 380 US at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them. The [quoted] language cites none of the relevant decisions in this area and, as interpreted by [petitioners], is contrary to the present state of the law on the subject."

As an alternative holding, the Court of Appeals ruled that to the extent this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens

on Indian retailers and Indian traders" (A11), the tax regulations at issue were barred by federal preemption because in the court's view they imposed "significant" burdens on the wholesalers (A11).

B. The Tax Scheme

Section 471(1) of the New York Tax Law imposes a tax on all cigarettes possessed in this State except where the cigarettes "are sold under such circumstances that this state is without power to impose such tax". The law presumes that all cigarettes within the State are subject to tax until the contrary is established and places upon the possessor the burden of proving nontaxability. The ultimate incidence and liability for the tax is upon the consumer. Tax Law § 471(2).

Payment of the cigarette tax in New York is effected through the use of stamps which are purchased and affixed to packages of unstamped cigarettes by registered stamping agents licensed by the Department of Taxation and Finance. The cigarettes are brought into the State untaxed, and the agents, by purchasing and affixing the stamps to the unstamped packages, make payment of the tax in advance of the products' first sale in New York. Thereafter, the tax is added and collected as a part of the selling price of the cigarettes by each of the entities effecting subsequent sales until it is ultimately added to the retail price and is borne by the consumer. The law provides civil and criminal penalties for the unlawful possession of untaxed cigarettes in the State, Tax Law §§ 481, 1814, 1846, 1847, and details the kinds of records which must be maintained by persons who "possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state". Tax Law § 474.

The regulations which implement the cigarette tax, and which are challenged in these actions, were adopted by the Commissioner of Taxation and Finance on August 29, 1988 and became fully effective on January 1, 1989. The regulations are designed to prevent the loss of an estimated $65 million in cigarette taxes annually by preventing the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets.[5] Broadly, the regulations create a mechanism whereby retail dealers of cigarettes on qualified Indian reservations are permitted to purchase a sufficient quantity of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time ensuring that if they wish to make sales of cigarettes to non-Indians they have available taxed and stamped product for that purpose. Only reservation retailers who have registered with the Department of Taxation and Finance are permitted to purchase or sell at retail unstamped cigarettes and then only in an amount which is no greater than the maximum legitimate Indian consumption of the reservation on which they are located. 20 NYCRR §§ 335.6 and 335.7. No limit is imposed

[5]This estimate, which is substantially higher than the estimate used in prior phases of this litigation, is the result of a study undertaken in early 1993 by the Department of Taxation and Finance's Office of Tax Policy Analysis. In conducting the study the Office of Tax Policy Analysis contacted and obtained information from cigarette agents and suppliers doing business both in and out of New York State. The estimate is based upon the figures supplied. However, because not all of the suppliers contacted cooperated in the study, the actual amount of tax revenue lost to the State is almost certainly higher. It is also estimated that the State loses approximately $35 million in taxes anually because of reservation sales of motor fuel to non-Indians.

upon the amount of stamped product which a retail dealer may purchase and sell.

The only portions of the regulations which impose any burdens upon the retailers' cigarette suppliers are 20 NYCRR §§ 335.6(f) and (g) and 335.7(b), (c) and (d).[6] Section 335.6(f) and (g) requires that suppliers making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations request a copy of the dealers' tax exemption certificate and keep the copy as a means of substantiating the fact that the sale was a valid tax-free transaction. The regulation also requires that suppliers keep accurate records and maintain written evidence of their sales. Section 335.7(b), (c) and (d) provides that prior to each sale and delivery of cigarettes to a qualified Indian reservation the supplier must obtain approval from either the Indian nation or tribe or from the Department of Taxation and Finance regarding the quantity of product which may be delivered and sold without prepayment and collection of the tax.

As described in Notice N-88-53, which was sent by the Department of Taxation and Finance to all licensed cigarette agents in this State, as well as to all registered motor fuel and

[6]Section 335.6(c) does not now have any impact upon cigarette suppliers but could if the Commissioner of Taxation and Finance were to authorize the use of special stamps to identify packages of cigarettes intended for nontaxable sale to qualified Indians. If the use of such stamps is authorized, suppliers who are also cigarette tax agents would bear the minimal burden of affixing the special stamps to those packages of cigarettes intended for sale to qualified Indians.

diesel fuel distributors, the preapproval requirements of 20 NYCRR § 335.7(b), (c) and (d) are intended to be satisfied by means of a coupon system whereby each month registered dealers will be sent "Tax Exemption Coupons" by the Department of Taxation and Finance entitling them to receive a predetermined quantity of tax free product. At the time of delivery, the dealer is to complete the tax exemption coupon and submit two copies to the supplier. The supplier keeps one of the copies and within five days forwards the other one to the Department of Taxation and Finance. The amount of tax free product delivered may not exceed the preprinted amount authorized by the coupon. Thus, the focus and principal burden of the regulatory scheme lies with and falls upon the Indian nation or tribe and the reservation retailer. The only burden imposed upon the supplier is a minimal one relating to recordkeeping and reporting.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with the decisions of this Court affirming the rights of States to impose minimal burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers and raises significant issues concerning the preemptive effect of the Indian trader statutes.

The decision of the Court of Appeals is in direct conflict with *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), and *Oklahoma Tax Comm'n. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US

505 (1991), the case which this Court required the Appellate Division to consider on remand. We had believed that in those cases this Court made plain that States are free to impose minimal burdens on Indian traders in order to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers. Nevertheless, the Court of Appeals, citing to its own decision in *Herzog Brothers Trucking*, where the court had held that the preemptive effect of the Indian trader statutes, 25 USC § 261 *et seq.*, was such as to preclude the State from imposing *any* burden on Indian traders, no matter how minimal, ruled that the challenged tax scheme was invalid because it imposed obligations on Indian traders. Because of this direct conflict and because the issue of whether States may employ Indian traders as an aid to monitoring and enforcing their tax laws is of great importance to those States in which Indian reservations are located, certiorari should be granted to correct the Court of Appeals' erroneous ruling.

In *Moe*, this Court upheld the right of the State of Montana to require Indian tribal sellers of cigarettes to collect a State sales tax imposed upon non-Indian purchasers of cigarettes. The tax scheme, which in this respect is similar to that of New York, required the seller to pay the tax to the wholesaler and then add it to the purchase price of the cigarettes for payment by the ultimate consumer. *See, Confederated Salish and Kootenai Tribes v Moe*, 392 F Supp 1297, 1308 (Dist of Montana 1975).

In approving the Montana law, this Court emphasized the fact that the cigarette tax had been validly imposed and observed that without the expedient of having the retailer collect the tax from the non-Indian purchasers "wholesale violations of the law by the latter class will go virtually unchecked". 425 US at 483. The Court distinguished *Warren Trading Post Co. v Arizona Tax Commission,* 380 US 685 (1965), which the court below cited as controlling, on the ground that the tax in that case, a gross income tax imposed on the on-reservation sales by a trader to reservation Indians, had been imposed directly on the seller and could, therefore, have put additional financial burdens on the trader or the Indians with whom it dealt. 380 US at 691. This, the Court held, "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations". *Id.* In contrast, the collection requirement of the Montana law was characterized by the Court as "a minimal burden designed to avoid a likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax". 425 US at 483. The quoted language, from *Warren Trading Post Co.,* was held not to apply. 425 US at 482.

Although *Moe* did not deal directly with the question of whether the "minimal burden" approved with respect to Indian retailers could similarly be imposed upon the Indians' distributors, one step further back in the chain of distribution, the conclusion that it can becomes manifest when *Moe* is read in conjunction with *Colville,* which this Court decided four years later.

In *Colville,* this Court upheld the right of the State of Washington to impose minimal regulatory burdens on the operators of tribal smokeshops in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes at the smokeshops. Quite significantly, although the operators of the smokeshops were federally licensed Indian traders, *see, Confederated Tribes of Colville v State of Washington,* 446 F Supp 1339, 1347 (ED Wash 1978), and thus subject to the Indian trader laws, this Court nevertheless upheld the right of the State of Washington to compel the operators to comply with the State's cigarette tax laws, which required them to purchase and affix tax stamps to packages of cigarettes intended for sale to non-Indians, and also required them to keep detailed records of their taxable and nontaxable sales. In ruling as it did, this Court made clear that federal Indian law, including the Indian trader statutes, did not preempt the Washington State tax scheme. The Court said, 447 US at 155:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Of perhaps even greater significance is the further holding of the Court that the State of Washington had the power to seize shipments of unstamped cigarettes traveling to the reservation from out-of-state wholesalers even though the sales by the wholesalers to the tribal businesses were concededly exempt from State taxation and no State tax was due while the cigarettes were in transit. 447 US at 161-162.

This holding is in sharp contrast to the conclusion of the Court of Appeals, both here and in *Herzog Brothers Trucking*, that the Indian trader laws in and of themselves place every transaction between an Indian tribe and its supplier beyond the regulatory authority of the States.

Any doubts which may have continued to exist following *Colville* regarding the viability of State tax schemes which employ an Indians' supplier as an aid to enforcement should have been laid to rest when, in February, 1991, this Court decided *Potawatomi*. In that case, the Citizen Band of Potawatomi Indian Tribe (hereinafter "Tribe" or "Potawatomis") filed suit in the United States District Court for the Western District of Oklahoma to enjoin an assessment by the Oklahoma Tax Commission seeking $2.7 million for taxes on cigarette sales occurring between 1982 and 1986 at a convenience store owned and operated by the Tribe on land held in trust for it by the Federal Government. Among other questions before this Court was whether the Potawatomis' sovereign immunity prevented the Tribe from being liable for the collection of State taxes on the sale of cigarettes to nonmembers of the Tribe.

Citing to *Colville* and *Moe*, this Court answered this question in the negative, observing that "[a]lthough the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes". 498 US at 512. Of signal importance to the issue raised here, however, is that in response to Oklahoma's complaint that the Tribe's sovereign immunity would prevent it from enforcing its right

to tribal assistance guaranteed by such cases as *Moe* and *Colville*, the Court stated that the State could, under its decision, secure collection of the taxes by pursuing the Indians' wholesalers. The Court said, 498 US at 514:

> "In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, Colville, supra*, [447 US] at 161-162, *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v Oklahoma Tax Comm'n*, 898 F. 2d 122 (CAlO 1990). * * *". Emphasis added.

The Court of Appeals, based upon its earlier analysis in *Herzog Brothers Trucking*, read this passage narrowly. The court stated that while the remedies discussed "might somehow be used to retroactively collect taxes unpaid on past sales" (A11), *Potawatomi* did not permit the State to

exercise regulatory authority over Indian traders "prospectively" to aid in the enforcement of its tax laws (A10). But the distinction drawn by the Court of Appeals is fallacious. If the Indian trader laws represent a bar to the exercise by the States of regulatory authority over Indian traders in their dealings with their Indian customers, it should not matter whether that authority is exercised prospectively or retrospectively. It seems clear to us that by instructing in *Potawatomi* that States have the right to collect sales tax from an Indian tribe's cigarette wholesaler by filing assessments against the wholesaler, this Court plainly was indicating that not all burdens placed upon Indian traders by States attempting to prevent the avoidance of tax by non-Indians doing business on Indian reservations are impermissible.

Central Machinery Co. v Arizona Tax Commission, 448 US 160 (1980), on which the respondents will undoubtedly rely, does not lead to a different result. In *Central Machinery Co.* this Court ruled that the State of Arizona could not impose a tax against the seller of goods when the sale was made to a tribal enterprise on an Indian reservation. The tax was a "transaction privilege tax" on the privilege of doing business in the State of Arizona. 448 US at 161-162. The amount of the tax was added as a separate item to the price of goods sold and was actually borne by the tribal enterprise. The Court ruled that its decision in *Warren Trading Post Co.* was controlling and held that the Indian trader statutes preempted the asserted State tax.

Although this Court couched its decision in *Central Machinery Co.* in terms of federal preemption, it is clear that the basis of the Court's ruling was not the mere existence and

breadth of the Indian trader statutes, but the underlying fact that the Arizona tax, which was characterized by the Court as being "precisely the same tax as was involved in *Warren Trading Post Co.*", 448 US at 164 n 3, actually had as its target the tribal enterprise and its supplier and could, therefore "'disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission'". *Id.*, quoting from *Warren Trading Post Co.*, 380 US at 691. In contrast, just 17 days earlier in *Colville*,[7] this Court let stand the Washington State tax scheme which, while imposing regulatory burdens on federal Indian traders, did not target the traders or the tribe or its members for payment of the tax.

It follows that the formalistic and mechanical approach adopted by the Court of Appeals to the effect that State regulation of the respondents is impermissible simply because they are Indian traders, represents a fundamental misapplication of this Court's precedents which should be explicitly corrected. As was observed by this Court in a slightly different context in *Cotton Petroleum Corp. v New Mexico*, 490 US 163, 176 (1989), where this Court upheld a New Mexico severance tax on the same on-reservation production of oil and gas by non-Indian lessees as was subject to the tribes' own severance tax:

> "questions of pre-emption in [the area of Indian affairs] are not resolved by reference to

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[7] *Colville* was decided by this Court on June 10, 1980; *Central Machinery Co.* was decided on June 27, 1980.

> standards of pre-emption that have developed in other areas of the law, and are not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.' [Citations omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal and tribal interest.'" Citation omitted.

See also, Rice v Rehner, 463 US 713 (1983).

The Court of Appeals' alternative holding (A11-A12), that the challenged regulations are impermissible because they place "significant" burdens on wholesalers is similarly incorrect. As affects wholesalers, the challenged regulations are quite limited in their scope. They require no more than that cigarette distributors making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations obtain and keep a copy of the dealers' tax exemption certificate and keep accurate records and maintain written evidence of their sales (20 NYCRR § 335.6[f] and [g]), and obtain from the dealer and forward to the Department of Taxation and Finance the "Tax Exemption Coupons" through which it is contemplated that the limitations on tax exempt sales will be satisfied (*see*, pp 13-14, *supra*). In contrast, in *Colville*, this Court approved *in toto* Washington State's much more onerous recordkeeping requirements, which required smokeshop operators not only to record and retain for State inspection the number and dollar volume of taxable sales to nonmembers of the Tribe, but to record and retain "the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are

made and the dollar amount and dates of sales". 447 US at 159. Since the operators of the smokeshops in *Colville* failed to present any evidence on the question of whether the requirements of the law were overly burdensome, it was this Court's holding that the Tribes failed to meet their burden of showing that the challenged tax scheme was not reasonably necessary as a means of preventing fraudulent transactions. 447 US at 160. Here, too, there is no evidence on the question of whether the requirements of the New York law are not reasonably necessary to prevent the avoidance of tax by non-Indians doing business at reservation outlets. Thus, the Court of Appeals was clearly in error when it ruled that the challenged regulations exceeded the limits of permissible State action established by this Court's decisions in *Potawatomi, Moe* and *Colville*.

In addition, the Court of Appeals totally mischaracterized the nature of New York's regulatory scheme by asserting that "[t]he tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, *imposes a sales tax on Indian retailers*" (A11; emphasis added). As this Court's decisions make clear, such a precollection requirement with respect to cigarettes intended for sale to non-Indians does not amount to taxation of Indians, but represents the legitimate assertion by the State of its long recognized authority to employ Indian Tribes and retailers, and now their suppliers, "to assist in the collection [from non-Indians] of validly imposed state sales taxes". *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma, supra*, 498 US at 512; *see also Washington v Confederated Tribes of Colville Reservation,*

supra, 447 US 134; *Moe v Confederated Salish and Kootenai Tribes, supra*, 425 US 463, 483 (Collection requirement of Montana law in *Moe*, held to be not a "tax", but "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax"). If for no other reason, certiorari should be granted in these cases to correct the Court of Appeals' fundamental error in this respect.

These cases raise important issues that were wrongly decided by the Court of Appeals based upon its misreading and misapplication of relevant decisions of this Court. Fundamental tenets of federal Indian law and basic issues involving the right of States to prevent the avoidance of lawful taxes by non-Indian purchasers of goods from Indian retailers are at stake. Petitioners urge this Court to issue a writ of certiorari to review the decision of the New York Court of Appeals.

CONCLUSION

For the reasons stated, the Petition for a writ of Certiorari should be granted.

Dated: Albany, New York
August 31, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York,
Attorney for Petitioners
Department of Taxation and Finance of
the State of New York and James W.
Wetzler, Commissioner of Taxation and
Finance of the State of New York

JERRY BOONE
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General

of Counsel

APPENDIX.

APPENDIX A— Order of Court of Appeals.

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

3 No. 112

MILHELM ATTEA & BROTHERS INC., &c.,

Appellant,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Respondents.

(and another related action.)

The appellant in the above entitled appeal appeared by Williams Stevens McCarville & Frizzell, P.C. and Zdarsky

Sawicki & Agostinelli, Esqs.; the respondents appeared by Hon. Robert Abrams, Attorney General of the State of New York; and *amici curiae* appeared by Block & Colucci, P.C., Bradley S. Waterman, Esq., Roland Fogel Koblenz & Carr and Hodgson Russ Andrews Woods & Goodyear, Esqs.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, plaintiffs' motions for summary judgment granted, defendants' cross motions to dismiss the actions or for summary judgment denied, and judgment granted to plaintiffs in accordance with the opinion herein. Opinion by Judge Simons. Chief Judge Kaye and Judges Titone, Hancock, Bellacosa and Smith concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

STUART M. COHEN
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 10, 1993.

APPENDIX B—Opinion of the Court of Appeals.

STATE OF NEW YORK

COURT OF APPEALS

3 No. 112

MILHELM ATTEA & BROTHERS INC., &C.,

Appellant,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Respondents.

(and another related action.)

Joseph E. Zdarsky, for appellant Milhelm Attea & Bros.

Timothy M. O'Mara, for appellant Elias H. Attea, Jr.

Lew A. Millenbach, for respondents.

Joseph F. Crangle for Seneca Nation of Indians' Honor Indian Treaties Supporters Tribal Council Committee, *et al.*;

Seneca Nation of Indians; Empire State Petroleum Association, Inc.; Independent Petroleum Marketers of New York, Inc. *et al.*; and Saint Regis Mohawk Tribe *et al., amici curiae*.

SIMONS, J.:

This appeal requires the Court to assess the validity of tax regulations applicable to cigarette sales made on Indian reservations located in New York State. Although the challenged regulations are designed to prevent the avoidance of State taxes by non-Indians who purchase untaxed cigarettes from Indian retailers, and the incidence of the sales tax is intended to be borne by the ultimate non-Indian consumer, the tax provisions nevertheless regulate, to a significant degree, trade between wholesale distributors and their Indian purchasers, an area relevant decisions of the Supreme Court and this Court have found pre-empted by federal law. Accordingly, there must be a reversal.

I

Under New York Tax Law §471[1], a tax is imposed on all cigarettes purchased in New York. The tax is paid by the purchase of stamps which must be affixed to the cigarette packages as a precondition to the first taxable sale by the wholesaler or distributor. The tax is added and collected as a part of the selling price of the cigarettes along the distribution chain, until it is ultimately added to the retail price and is paid by the consumer.

Indians and Indian tribes are exempt from State taxation within their own territory and wholesale dealers may sell unstamped cigarettes to them. Consequently, many non-

Indians travel to Indian reservations to buy unstamped cigarettes and avoid the sales tax which should attach to all sales to non-Indians. In an effort to prevent this circumvention of the sales tax and prevent the sale of untaxed (unstamped) cigarettes to non-Indians at retail outlets on Indian reservations located in New York, the State Commissioner of Taxation and Finance adopted the regulations now challenged.

Under these regulations, only reservation retailers who have registered with the State Department of Taxation and Finance are permitted to purchase unstamped cigarettes, and then only in a predetermined amount calculated by the Department to approximate "probable demand of qualified Indian consumers in the trade territory" (*see*, 20 NYCRR §335.6 [d]; 20 NYCRR §335.7[c]).[1] Indian retailers may purchase an unlimited quantity of stamped cigarettes but, with respect to unstamped cigarettes, the wholesalers supplying them must 1) request a copy of the retailer's tax exempt certificate, 2) keep records of their sales, 3) obtain approval prior to each sale, from either the Indian nation or the Department of Taxation and Finance, of the quantity of untaxed cigarettes which may be delivered, and 4) after completion of the sale, forward to the Department of Taxation and Finance a copy of the retailer's tax exempt coupon, a document issued by the Department and entitling the retailer to receive a predetermined maximum quantity of untaxed cigarettes.

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[1]The Tribe or Nation may submit statistical information relating to probable demand, or the Department of Taxation will calculate the demand based upon average New York consumption per capita (20 NYCRR 335.7[d][2]).

II

Plaintiffs are business enterprises which sell cigarettes at wholesale to Indians on various Indian reservations in New York State. They commenced these actions claiming that the regulations, which impose additional burdens on their dealings with the Indians, are preempted by the Indian trader statutes (25 USC §§261 *et seq.*). The trial court granted plaintiffs' motion for summary judgment, and the Appellate Division initially affirmed. It found that "the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals interpretation of the applicable Supreme Court decisions" (relying on *Herzog Bros. Trucking v State Tax Commn*, 69 NY2d 536, *vacated and remanded*, 487 US 1212, *affd on remand*, 72 NY2d 720).

On appeal, the United States Supreme Court vacated the judgment and remanded to the Appellate Division "for further consideration in light of *Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US ____, 111 S Ct 905, 112 L Ed 2d 1112)." Upon reconsideration, the Appellate Division reversed itself, reading the *Potawatomi* decision to indicate that the "minimal burdens" imposed upon Indian traders by New York's tax scheme are not barred by federal pre-emption, a holding which would create considerable uncertainty about the reasoning underlying our decision in *Herzog*.

III

In *Herzog Bros. Trucking v State Tax Commn* (69 NY2d 536), fuel distributors challenged a State motor fuel tax assessed against them. Like the cigarette tax, the motor fuel tax was designed to be paid ultimately by the consumer as it

passed through the distribution chain. The legislation initially imposed a tax on wholesale sales of motor fuel to Indian retailers on Indian reservations but allowed a refund to distributors for previously paid taxes on fuel sold to Indians exempt from taxation. The Federal Indian trader statutes (25 USC §§261 *et seq.*), enacted pursuant to article 1, §8, cl. 3 of the Federal Constitution, vest the Commissioner of Indian Affairs with the sole power and authority to regulate trade with Indians and, because the tax scheme in *Herzog* imposed obligations upon wholesale Indian traders, we held that it was pre-empted by federal law (*see, Herzog Bros. Trucking v State Tax Commn*, 69 NY2d at 545-546). Upon remand from the United State's Supreme Court, we adhered to that determination (*see, Herzog Bros. Trucking v State Tax Commn*, 72 NY2d 720). We conclude the regulations at issue in [t]his case suffer from the same infirmity.

IV

As a general proposition Congress has pre-empted the field of regulating Indian traders. As the Supreme Court stated when referring to the Indian trader statutes and the regulations promulgated thereunder by the Commissioner of Indian affairs, "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (*see, Warren Trading Post Co. v Arizona Tax Commn*, 380 US 685, 690).

Notwithstanding the body of law supporting this view, defendants contend that "minimal burdens" may be placed upon wholesale distributors, i.e. Indian traders, if the tax is ultimately borne by non-Indian consumers and the tax

scheme is designed merely to prevent the evasion by those consumers of a legally imposed tax. They rely principally on two Supreme Court decisions in which the Court approved tax schemes which required Indian retailers to collect a tax validly imposed on non-Indian purchasers (*see, Moe v Confederated Salish & Kootenai Tribes*, 425 US 463; *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134). Explaining the result in *Colville*, the Court stated that: "[t]he Indian trader statutes . . . incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citing, *Warren Trading Post Co. v Tax Commn, supra*], *but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe*" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 155-156 [emphasis added]). Thus, the Supreme Court deemed it acceptable to place "minimum burdens" upon Indian retailers selling goods to non-Indians to aid a State in collecting and enforcing its taxes validly imposed upon non-Indian purchasers (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 159).

Defendants assert that the tax regulations at issue here are substantially the same as those at issue in *Moe* and *Colville*.They contend that inasmuch as the Supreme Court approved the imposition of precollection and recordkeeping requirements on Indian retailers in those cases, the State can lawfully impose them on wholesalers, who are just one step further back on the distribution chain. *Moe* and *Colville* involved burdens placed on Indian retailers dealing with non-Indians, rather than on wholesalers dealing with Indians, a significant difference, but defendants contend that a subsequent decision of the Supreme Court, *Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma* (498 US ____, 111 S Ct 905, 112 L Ed 2d 1112), makes it clear that a State's interest in enforcing its taxes may also justify the imposition of certain regulatory burdens on wholesalers supplying Indian retailers as an aid to enforcement of State tax laws. Indeed, the Supreme Court remanded the instant case to the Appellate Division for further consideration in light of the *Potawatomi* case.

V

In *Potawatomi*, the Supreme Court held that Oklahoma could not bring suit against the Potawatomi tribes for payment of uncollected cigarette taxes due for past sales made on the reservation (*see, Oklahoma Tax Commn v Citizen Band Potawatomi Indian Tribe of Oklahoma, supra*). Because the State sued the Tribe seeking payment for past taxes, the Court's decision was based upon the doctrine of sovereign immunity rather than on the Indian trader statutes. Oklahoma, noting that the *Moe* and *Colville* decisions gave states a right to require Indian retailers to collect a state-imposed cigarette tax on their sales to non-Indians, contended that if the tribes were immune from suit these decisions gave the states a right without a remedy. In response to that contention, the Supreme Court stated:

> There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State [citation omitted]. And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes*

> *off the reservation*, Colville, *supra*, at 161-162 . . . *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v Oklahoma Tax Commn* 898 F2d 122 (CA10 1990).

(*Oklahoma Tax Commn v Citizen Bank Potawatomi Indian Tribe of Oklahoma, supra*, 112 L Ed 2d at 1123 [emphasis added]). Defendants here rely on this underscored language, claiming it establishes that states may impose some burden on wholesalers supplying goods to Indian retailers to assist in the collection of valid State taxes. However, we do not interpret the Supreme Court's statement as altering the established rule stated in *Warren Trading Post Co. v Arizona Tax Commn* (*supra*, 380 US at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them. The language cites none of the relevant decisions in this area and, as interpreted by defendants, is contrary to the present state of the law on the subject. In the past, the Supreme Court has approved of cigarette seizures from wholesalers only where 1) the tribes to whom the cigarettes are to be sold have refused to fulfill tax collection and remittance obligations incurred on past sales, and 2) the seizures take place off the reservation "where state power over Indian affairs is considerably more expansive that it is within reservation boundaries" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 161-162). Here, the State is not seeking to collect taxes due on past sales, but is attempting, prospectively, to collect a tax on sales to be made *directly on the reservation*.

Just when "assessing wholesalers who supplied unstamped cigarettes to the tribal stores" would be justified remains unclear from the Supreme Court's decision, al-

though its use of the past tense "supplied" indicates that the method might somehow be used to retroactively collect taxes unpaid on past sales. But we do not read the Court's suggestions for collection remedies as altering the established law regarding federal preemption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers.

VI

To the extent that the Supreme Court's decision in *Moe, Colville* and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, we conclude that the tax regulations at issue here impose *significant* burdens on the wholesaler. They dictate to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade (*see*, 20 NYCRR §335.7[b][3]; §335.7[c]; §335.7[d][6]). The tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, imposes a sales tax on Indian retailers.

While the State's efforts to avoid what it perceives as pervasive tax avoidance by non-Indians is understandable, this tax scheme attempts to regulate in an area which Congress has taken "fully in hand" (*see, Warren Trading Post Co. v Arizona Tax Commn, supra*, 380 US at 690). It impinges on the federal interest, as evidenced by the Indian trader statutes, to "comprehensively . . . regulate businesses selling goods to reservation Indians" (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra*, 447 US at 155), and it impinges on the authority of the Commissioner of Indian Affairs to determine "the kind and quantity of goods and the prices at which such goods

shall be sold to the Indians" (*see*, 25 USC §261). Furthermore, to the extent that the sales tax is imposed on all stamped cigarettes, the regulations place "financial burdens on [plaintiffs] or the Indians with whom [they] deal [ ] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner" (*see, Warren Trading Post Co. v Arizona Tax Commn, supra*, 380 US at 691). Manifestly, the tax regulations before us regulate trade with Indians to a significant degree. As such, they are barred by Federal preemption and cannot be applied to cigarette wholesale dealers involved in trading with Indians on reservations located in New York State.

Accordingly, the order of the Appellate Division should be reversed, with costs, the respective plaintiff's motions for summary judgment granted, the defendants' cross motions to dismissed or for summary judgment denied, and judgment granted to plaintiffs in accordance with this opinion.

* * *

Order reversed, with costs, plaintiffs' motions for summary judgment granted, defendants' cross motions to dismiss the actions or for summary judgment denied, and judgment granted to plaintiffs in accordance with the opinion herein. Opinion by Judge Simons. Chief Judge Kaye and Judges Titone, Hancock, Bellacosa and Smith concur.

Decided June 10, 1993

This opinion is uncorrected and subject to revision before publication in the New York Reports.

APPENDIX C—Opinion and Order of Appellate Division, Third Department.

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

Decided and Entered: July 9, 1992 60199

MILHELM ATTEA & BROTHERS INC., Also Known as MILHELM ATTEA & BROTHERS INC.,

Respondent,

v

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Appellants.

(And Another Related Action.)

Calendar Date: June 2, 1992

Before: Weiss, P.J., Mikoll, Levine, Mercure and Harvey, JJ.

Robert Abrams, Attorney-General (Lew A. Millenbach of counsel), Albany, for appellants.

Zdarsky, Sawicki & Agostinelli (Joseph Zdarsky of counsel), Buffalo, for Milhelm Attea & Brothers Inc., respondent.

Williams, Stevens, McCarville & Frizzell, P.C. (Timothy M. O'Mara of counsel), Buffalo, for Elias H. Attea Jr., respondent.

Duker & Barrett (George F. Carpinello of counsel), Albany, for Oneida Indian Nation of New York, *amicus curiae*.

Roland, Fogel, Koblenz & Carr (Emilio Petroccione of counsel), Albany, for Empire State Petroleum Association Inc., *amicus curiae*.

MIKOLL, J.

Appeal, upon remand from the United States Supreme court, from an order and judgment of the Supreme Court (Cheeseman, J.), entered August 22, 1989 in Albany County, which, *inter alia*, declared portions of 20 NYCRR parts 331 and 335 to be unconstitutional, and enjoined and restrained defendants from taking any steps to implement said regulations.

This matter is before us on remand from the United States Supreme Court for further consideration in light of its recent opinion in *Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.* (498 US ____, 111 S Ct 905). The underlying facts are set out in this court's prior decision (164 AD2d 300, *appeal dismissed* 77 NY2d 989, *lv denied* 78 NY2d 858, *vacated* ____ US ____, 112 S Ct 926).

In our initial review of the matter, we held that *Herzog Bros. Trucking v State Tax Commn.* (72 NY2d 720, 724-725) compelled invalidation of the tax scheme in issue here on the ground of Federal preemption. We found that the scheme placed a burden upon wholesalers known as Indian traders, who are licensed by the Federal government to trade with Indians (*see*, 25 USC § 261 *et seq.*), and that Congress had preempted the field of regulating trade with Indians on reservations (*see, id.*), thus foreclosing the imposition of supplementary State tax laws that impose burdens on Indian traders (164 AD2d 300, *supra*).

We note that the Federal preemption issue presented by the tax scheme in the instant case was not before the Supreme Court in *Oklahoma Tax Commn.* The Supreme Court indicated, however, in response to concerns based upon Indian sovereign immunity vis-a-vis enforcement of a scheme where Indians were required to collect and remit taxes due for sales to non-Indians, that "under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores" (*Oklahoma Tax Commn. v Citizens Band Potawatomi Indian Tribe of Okla.*, at 912 [citation omitted]).

From this we conclude that the Supreme Court is of the view that not all burdens placed upon Indian traders by states attempting to implement and enforce tax schemes aimed at taxing sales by Indian retailers to non-Indians made on Indian reservations are impermissible. The Supreme Court's observations call into question the continued

validity of the legal analysis underpinning the Court of Appeals' decision in *Herzog Bros. Trucking v State Tax Commn.* (69 NY2d 536, *vacated* 487 US 1212) and again considered by that court upon remand from the Supreme Court (*see, Herzog Bros. Trucking v State Tax Commn.*, 72 NY2d 720, *supra*) and which opinion was the legal underpinning for our holding in this matter (164 AD2d 300, *supra*).[1]

We now hold that minimal burdens such as are prescribed by the tax scheme promulgated pursuant to 20 NYCRR 335.5 upon Indian traders in collecting sales taxes on sales by Indian retailers to non-Indian purchasers made on Indian reservations are not barred by Federal preemption of the field of regulating trade with Indians (*see*, 25 USC § 261 *et seq.*).

Weiss, P.J. Levine, Mercure and Harvey, JJ., concur.

ORDERED that the order and judgment is reversed, on the law, without costs, motions denied, cross motions granted, summary judgment awarded to defendants and it is declared that those portions of 20 NYCRR parts 331 and 335 at issue herein have not been shown to be unconstitutional.

ENTER:
/s/MICHAEL J. NOVACK
MICHAEL J. NOVACK
Clerk

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[1]We note that the regulations at issue here are not the same as those addresed by the Court of Appeals in *Herzog Bros. Trucking*.

APPENDIX D—Order of United States Supreme Court Granting Petitioners' Petition for a Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Washington, D. C. 20543

January 21, 1992

Mr. Jerry Boone
Solicitor General
The Capitol
Albany, NY 12224

Re: Department of Taxation and Finance of New York, *et al. v. Milhelm Attea & Bros., Inc., aka Milhelm Attea & Brothers, Inc., et al.*
No. 91-907

Dear Mr. Boone:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department, for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U. S. ____ (1991).

Very truly yours,

WILLIAM K. SUTER, Clerk

RECEIVED
Jan 27 1992
Department of Law
Albany Office
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APPENDIX E—Original Opinion of Appellate Division, Third Department.

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

December 6, 1990

MILHELM ATTEA & BROTHERS, INC., Also Known as MILHEM ATTEA & BROTHERS, INC.,

Respondent,

v

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Appellants.

(And Another Related Action.)

Argued, October 6, 1990.

Before:

Hon. Leonard A. Weiss, Justice Presiding

Hon. Ann T. Mikoll, Hon. Howard A. Levine, Hon. Thomas E. Mercure, Hon. Norman L. Harvey, Associate Justices.

APPEAL from an order and judgment of the Supreme Court (PAUL E. CHEESEMAN, J.), entered August 22, 1989 in Albany County, which, *inter alia*, declared certain portions of 20 NYCRR parts 331 and 335 to be unconstitutional.

ROBERT ABRAMS, Attorney-General (Lew A. Millenbach of counsel), The Capitol, Albany, New York 12224, for appellants.

KAVINOKY & COOK (Joseph E. Zdarsky of counsel), 120 Delaware Avenue, Buffalo, New York 14202, for Milhelm Attea & Brothers, Inc., respondent.

WILLIAMS, STEVENS, McCARVILLE & FRIZZELL, P.C. (Timothy M. O'Mara of counsel), 1920 Liberty Building, Buffalo, New York 14202, for Elias H. Attea, Jr., respondent.

MIKOLL, J.

Plaintiff in action No. 1, Milhelm Attea & Brothers, Inc. (hereinafter Attea Brothers), a wholesale dealer of cigarettes

licensed under Tax Law § 480, is a New York corporation with its principal place of business in Erie County. Almost 75% of its sales are to Indians on Indian reservations in New York. Plaintiff in action No. 2, Elias H. Attea, Jr., also sells cigarettes wholesale to Indians on Indian reservations in New York.

The Tax Law imposes a cigarette tax on all cigarettes possessed in this State for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax" (Tax Law § 471 [1]). Sale of cigarettes on Indian reservations to Indians for personal consumption are exempt from State taxation (20 NYCRR 335.5 [2]). Pursuant to regulations applicable to sales made after January 1, 1989, a tax is imposed on cigarettes sold at wholesale to Indians on Indian reservations for retail sale to non-Indians (*see*, 20 NYCRR 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 335.5). Wholesalers may purchase, tax free, a quantity of cigarettes determined by defendant Department of Taxation and Finance (hereinafter the Department) to be the amount needed to supply the personal needs of the Indian consumers (20 NYCRR 335.5). Thus, the quantity of tax-free cigarettes which may be sold by the wholesalers is limited (20 NYCRR 335.5 [e]). Further, record-keeping requirements are imposed on the wholesalers (*see, e.g.*, 20 NYCRR 337.3) and applications for refunds for exempt sales upon which the tax was prepaid may be necessary (*see, e.g.*, 20 NYCRR 340.1).

Plaintiffs commenced the instant declaratory judgment actions seeking to have the new regulations declared invalid and to enjoin their enforcement. Subsequently, both plaintiffs moved for a preliminary injunction restraining enforcement of the new regulations. The motions were granted. Thereafter, motions were made by the respective parties for summary judgment. Supreme Court granted

plaintiffs' summary judgment motions for the relief demanded in the complaint and denied defendants' cross motions. The court also permanently enjoined defendants from, *inter alia*, enforcing the regulations. This appeal by defendants ensued.

The issues presented here are similar to those considered by the Court of Appeals in *Herzog Bros. Trucking v. State Tax Commn.* (69 NY2d 536) and again considered by that court (72 NY2d 720) upon remand from the United States Supreme Court (*State Tax Commn. of State of N.Y. v. Herzog Bros. Trucking*, 487 US 1212). As here, the plaintiff in *Herzog* was a wholesaler selling a product, in that case motor fuel, to Indians on a reservation who then sold it at retail to Indian and non-Indian consumers. There, the wholesaler was to collect the fuel tax upon the first sale and the tax was then included in the retail price and passed on to the ultimate consumer (*see, Herzog Bros. Trucking v. State Tax Commn.*, 72 NY2d 720, 723, *supra*). A refund or credit was made where the ultimate consumer was an Indian (*id.*). When the Court of Appeals initially heard the case, it reversed this court's decision which had found the tax scheme valid (*Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 536, *supra, revg.* 122 AD2d 518). The Court of Appeals at that time held that:

> * * * Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary State tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders * * *. Thus, no matter how minimal the burden imposed on the motor fuel taxation scheme on [the plaintiff], as a trader to the Seneca Nation, such regulation is preempted by the Federal Indian trader laws * * * (*id.*, at 546 [citation omitted]).

When the first *Herzog* case went to the United States Supreme Court, the case was remanded (*State Tax Commn. of State of N.Y. v. Herzog Bros. Trucking*, 487 US 1213, *supra*) to the Court of Appeals to consider the effect of the motor fuel tax scheme contained in newly enacted regulations effective November 30, 1988 and applicable to sales made after January 1, 1989. Those regulations differed from the regulations originally in issue (*Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 56, *supra*), but are substantially similar to those at issue in the instant case. The regulations originally in issue in *Herzog* required the wholesaler to prepay sales tax on all fuel sold and apply for a refund or credit of tax paid where the ultimate sale was tax exempt. During the pendency of *Herzog*, the Department published for comment new regulations which, like the regulations now before the court, provided for preapproval of tax-free sales to Indians by registered dealers. No tax was to be paid on fuel designated for such sales at any point in the transaction (20 NYCRR 414.7 [a] [3]). The amount of fuel which would be preapproved for tax-free sale was set by the Department based on projected Indian consumption (20 NYCRR 414.7 [a] [2]; [b]). On remand from the United States Supreme Court for consideration of the case in light of the newly published regulations, the Court of Appeals refused to review the constitutionality of those regulations, reasoning that to do so would be to render an advisory opinion (*Herzog Bros. Trucking v. State Tax Commn.* 72 NY2d 720, 725, *supra*).

This court is now called upon to address the constitutionality of similar regulations. When the Court of Appeals heard *Herzog* on remand, it referred to its analysis of the case law on the issue in the first *Herzog* case and opined that "[i]n the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions and our

application of them to the facts before us represents the present state of the law on the subject" (*id.*, at 724-725). Accordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals' interpretation of the applicable Supreme Court decisions (*see, id., see also, Warren Trading Post Co. v. Arizona Tax Commn.*, 380 US 685, 690; *Herzog Bros. Trucking v. State Tax Commn.*, 69 NY2d 536, 546, *supra*).

We note that this court's decision in *Matter of DeLoronde v. New York State Tax Commn.* (142 AD2d 90, *appeal dismissed, lv denied* 73 NY2d 986) was rendered November 23, 1988 without the benefit of the decision on remand in *Herzog*, which was rendered December 22, 1988.

Opinion by MIKOLL, J., in which WEISS, J.P., LEVINE, MERCURE and HARVEY, JJ., concur.

Order and judgment affirmed, with costs.

APPENDIX F—Original Order of Appellate Division, Third Department.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 9th day of October, 1990.

PRESENT:

HON. LEONARD A. WEISS,
Justice Presiding,
HON. ANN T. MIKOLL
HON. HOWARD A. LEVINE
HON. THOMAS E. MERCURE
HON. NORMAN L. HARVEY,
Associate Justices.

MILHELM ATTEA & BROS., INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff-Respondent,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Appellants-Defendants.

(FIRST ACTION)
County Clerk's Index No. 7-89

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff-Respondent,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Appellants-Defendants.

(SECOND ACTION)
County Clerk's Index No. 8-89

Defendants-Appellants, Department of Taxation and Finance of the State of New York, James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, and the Tax Appeals Tribunal of the State of New York, having appealed from an ORDER AND JUDGMENT of the Supreme Court of the State of New York, Albany County, entered on the 22nd day of August, 1989, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this court, and having been argued by Robert Abrams, Attorney General of the State of New York (Lewis A. Millenbach, Esq. of Counsel) for appellant, and by Kavinoky & Cook (Joseph E. Zdarsky, Esq. of Counsel) for respondent in the First Action, and by Williams, Stevens, McCarville & Frizzell, P.C. (Timothy O'Mara, Esq. of Counsel) for respondent in the Second Action, and, after due deliberation, the court having rendered a decision on the 6th day of December, 1990 (Opinion per Mikoll, J.), it is hereby

ORDERED that the Order and Judgment so appealed from be and the same hereby are affirmed, with costs.

ENTER:

/s/ MICHAEL J. NOVACK
Clerk

DATED AND ENTERED: January 8, 1991
A TRUE COPY
Michael J. Novack
Clerk

APPENDIX G—Opinion of Supreme Court, Albany County.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

MILHELM ATTEA & BROS. INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC. 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff,

against

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff,

against

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(Supreme Court, Albany County Motion Term)
(RJI No. 01-89-017022; 01-89-017023)

(Justice Paul E. Cheeseman, Presiding)

APPEARANCES:

Kavinoky & Cook, Esqs.
Attorneys for Milhelm Attea & Sons
Joseph E. Zdarsky, of Counsel
120 Delaware Avenue
Buffalo, New York 14202

Williams, Stevens, McCarville & Frizzell, P.C.
Attorneys for Elias H. Attea, Jr.
Timothy M. O'Mara of Counsel
1920 Liberty Building
Buffalo, New York 14202

Hon. Robert Abrams, Attorney General of the State of New York
Attorneys for Defendant
Richard Freshour, Assistant Attorney General, of Counsel
The Capitol
Albany, New York 12224

CHEESEMAN, J.:

The two above captioned plaintiffs each commenced a declaratory judgment action against the Commissioner of Taxation and the Department of Taxation concerning the certain imposition by the State of New York of its cigarette taxes upon plaintiff's sale of cigarettes made to Indians on Indian Reservations located within the state's territorial

boundaries. The defendant moves to dismiss the action for failure to exhaust their administrative remedies, or in the alternative for summary judgment.

Plaintiffs move for summary judgment seeking an order declaring among other things that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States.

The plaintiff, Milhelm Attea and Bros. Inc. is a New York Corporation with its principal place of business in Erie County New York. This corporation is a wholesale dealer of cigarettes licensed under New York Tax Law Section 480. The corporation is engaged in the wholesale distribution of sale of cigarettes in New York. A substantial part of the corporation's business is the distribution and wholesale of cigarettes to Indians on Indian Reservations. The plaintiff, Elias H. Attea, Jr. is also engaged in the wholesale distribution and sale of cigarettes. Mr. Attea's business is exclusively with Indians on Indian Reservations within the territorial boundaries of the State of New York.

New York State Tax Law Section 471[1] imposes a cigarette tax on all cigarettes possessed in this state for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this State is without power to impose such tax." (Tax Law Section 471[1]).

On August 29, 1988, the Commissioner of Taxation and Finance adopted a new cigarette regulation seeking, among other things to apply New York's Tax Law to sales of cigarettes made by cigarette wholesalers such as the two plaintiffs herein, to Indians on Indian Reservations.

The plaintiffs contend that the application of New York's Tax Law and the imposition of a state cigarette tax with

respects to its wholesale transaction with Indians on Indian Reservations are pre-empted by Federal Law. (Article 1, Section 8, clause 3 of the United States Constitution). This clause of the Constitution grants Congress the sole power to regulate commerce with Indian tribes. Pursuant to this delegation of power, Congress enacted the Indian traders statutes, 25 U.S.C. Section 261 *et seq*. which granted the Commissioner of Indian Affairs the sole power and authority with regard to the regulation of trading with Indians on Indian Reservations.

The State contends that there is currently occurring in various sections of the State a systematic practice of tax evasion of monumental proportions involving the retail sale of both cigarettes and motor fuel on Indian reservations to non-Indian purchasers. This practice plaintiff argues is costing the State enormous sums in lost revenues and is also seriously harming off-reservation businesses in the adjacent areas.

The State also contends that the Indian Trader statutes are not to be given automatic effect, but must be analyzed on a case by case basis.

The issue before us has, in our opinion, been disposed of by the New York Court of Appeals in a case involving wholesale sales of motor fuel to Indians on Indian Reservations. The Court of Appeals held *Herzog Brothers Trucking, Inc. v. State Tax Commission,* 69 NY2d 536 that the Federal Indian Trader Laws pre-empted State regulation of any person trading with Indians on Indian Reservations.

The United States Supreme Court pursuant to a summary reconsideration order, granted a petition for a writ of certiorari, vacating the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of new motor fuel tax regulations which were proposed by the defendants subsequent to the

Court of Appeals' decision in *Herzog (State Tax Commission of the State of New York v. Herzog Brothers, Inc.* ____ U.S. ____, 108 S.Ct. 2861 [1988]). On December 22, 1988, the Court of Appeals reaffirmed its May 7, 1987 decision in all respects and specifically rejected the argument that its prior decision was overly broad because it barred all taxation and regulation of sales to Indians on Indian Reservations. (*Herzog Brothers Trucking Inc. v. State Tax Commission*, 72 NY2d 720.

On the facts in the case before us we see no distinction between the attempted imposition of a cigarette tax by the State as compared to the attempted imposition of a motor fuel tax.

According, under the authority of the Court of Appeals in the *Herzog* case, the plaintiffs' motion for summary judgment is in all respects granted. Defendant's motion to dismiss or, in the alternative for summary judgment, is in all respects denied.

PAUL E. CHEESMAN
J.S.C.

Dated: June 5th 1989
At Albany, New York

APPENDIX H—Order and Judgment of Supreme Court, Albany County.

At a term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 30th day of May, 1989.

SUPREME COURT: COUNTY OF ALBANY

STATE OF NEW YORK

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(First Action)
Index No. 7-89
RJI No. 0189017023

Justice Assigned: Hon. Paul E. Cheesman

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(Second Action)
Index No. 8-89
RJI No. 0189017022
Justice Assigned: Hon. Paul E. Cheeseman

Order and Judgment Granting Declaratory Judgment and Permanent Injunction

Plaintiffs in each of the above referenced actions, having each made a motion for an Order and Summary Judgment

pursuant to CPLR §3212 declaring: (1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto; (2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and (3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants, insofar as they purport to provide that such sales are subject to New York State taxes or regulation, are null and void and of no force and effect; and plaintiffs having also moved for summary judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons: (1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York; (2) from commencing or causing to be commenced, or maintaining, under

the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiffs by reason of or in connection with said sales; and (3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants by reason of or in connection with such sales; and the defendants having cross-moved to dismiss each of the actions for the plaintiffs' failure to exhaust their administrative remedies, or, in the alternative, for summary judgment,

NOW, THEREFORE, as to the first action referred to above, upon reading and filing the Notice of Motion for Summary Judgment dated March 31, 1989, the affidavit of Rosemary Saffire, sworn to the 31st day of March, 1989, the affidavit of Joseph E. Zdarsky, sworn to the 27th day of May, 1989, and the respective exhibits annexed thereto, all in support of the motion of the plaintiff in the first action and upon reading and filing the defendant's Notice of Cross-Motion for Summary Judgment dated May 19, 1989, the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto, all in opposition to the motion of the plaintiff in the first action and in support of the defendants' cross-motion, and upon all the pleadings and proceedings heretofore had in the first action; and, as to the second action referred to above, upon reading and filing the Notice of Motion dated April 24, 1989, the affidavit of Elias H. Attea, Jr., sworn to the 24th day of April, 1989, the affidavit of Timothy M. O'Mara, sworn to the 30th day of May, 1989, and the respective exhibits annexed thereto, all in support of the plaintiff's motion in the second action, and upon reading and filing the defendants' Notice of Cross-Motion dated the

19th day of May, 1989, the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto in opposition to the plaintiffs' motion in the second action and in support of the defendants' cross-motion, and upon all pleadings and proceedings heretofore had in the second action, and after hearing Kavinoky & Cook, Joseph E. Zdarsky, Esq., of counsel, attorneys for Milhelm Attea & Bros., Inc., the plaintiff in the first action referred to above in support of the motion of the plaintiff in said action, and in opposition to the defendants' cross-motion; and Williams, Stevens, McCarville & Frizzell, P.C., Timothy M. O'Mara, Esq., of counsel, attorneys for Elias H. Attea, Jr., the plaintiff in the second action referred to above, in support of the motion of the plaintiff in said action and in opposition to the defendants' cross-motion, and the Hon. Robert Abrams, Attorney General of the State of New York, Richard J. Freshour, Esq., Assistant Attorney General, of counsel, attorneys for the defendants in each of the actions in opposition to the said plaintiffs' motion and in support of the defendants' cross-motions; and due deliberation having been had thereon, and the court having rendered its written decision dated June 5, 1989; it is hereby

ORDERED, that the respective motions of Milhelm Attea & Bros., Inc., the plaintiff in the first action above, and Elias H. Attea, Jr., the plaintiff in the second action above, for summary judgment granting a declaratory judgment and permanent injunctive relief, be and the same hereby are in all respects granted; and it is further

ORDERED that the defendants' cross-motions to dismiss each of the above referenced actions or, in the alternative, for summary judgment, are in all respects denied; and it is further

ORDERED AND ADJUDGED, with respect to the first action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the

State of New York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Milhelm Attea & Bros., Inc. and/or provide that such sales are subject to New York state taxes or regulation, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Milhelm Attea & Bros., Inc. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but not limited to regulations adopted on August 29, 1988, and published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of

Part 331 and Sections 335.3 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the boundaries of the State of New York; and it is further

ORDERED and ADJUDGED, with respect to the second action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the law of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made

by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Elias H. Attea, Jr. and/or provide that such sales are subject to New York State taxes or regulations, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Elias H. Attea, Jr. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but

not limited to regulations adopted on August 29, 1988, and published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York.

Dated: Albany, New York
Aug. 2, 1989

Hon. Paul E. Cheeseman,
Justice of the Supreme Court

ENTER:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY CLERK'S OFFICE)

I, THOMAS G. CLINGAN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Order with the original thereof filed in this office on the 22nd day of Aug., 1989 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal this 22nd day of Aug., 1989.

Thomas G. Clingan, Clerk

Office of Albany County Clerk
Albany, N.Y.
Aug 22 2 58 PM '89

APPENDIX I—Statutory and Regulatory Provisions Involved.

25 USC:

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. (Aug. 15, 1876, c. 289 § 5, 19 Stat. 200.)

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.
(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066, Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so

long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein; *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

New York Tax Law:

§ 471. Imposition of cigarette tax

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale on and after June first, nineteen hundred ninety-three, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces

of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. Such tax on cigarettes shall be the at the rate of twenty-eight cents for each ten cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be fourteen cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the tax commission so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix

stamps on such packages of cigarettes. Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps.

3. The amount of taxes advanced and paid by the agent as hereinabove provided shall be added to and collected as part of the sales price of the cigarettes.

§ 474. Records to be kept; examination

1. Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in cigarettes in this state and subject to the provisions of this article.

2. Every person who shall possess or transport more than two hundred fifty cigars or more than five pounds of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the

person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in tobacco products in this state and subject to the requirements of this article.

3. Every dealer or distributor or employee thereof, or other person acting on behalf of a dealer or distributor, who shall possess or transport more than fifty cigars or more than one pound of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that the tax imposed by this article on tobacco products has not been paid and is due and owing.

4. At the time of delivering cigarettes to any person each agent or wholesale dealer, and at the time of delivering tobacco products to any person each distributor or wholesale dealer of tobacco products, shall make a true duplicate invoice showing the date of delivery, the number of packages and number of cigarettes contained therein, in each shipment of cigarettes delivered, and the items and quantity and wholesale price of each item in each shipment of tobacco products delivered, and the name of the purchaser to whom delivery is made, and shall retain the same for a period of three years subject to the use and inspection

of the commissioner of taxation and finance. Each dealer shall procure and retain invoices showing the number of packages and number of cigarettes contained therein, in each shipment of cigarettes received by him, and the items and quantity and wholesale price of each item in each shipment of tobacco products received by him, the date thereof, and the name of the shipper, and shall retain the same for a period of three years subject to the use and inspection of the commissioner of taxation and finance. The commissioner of taxation and finance by regulation may provide that whenever cigarettes or tobacco products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner of taxation and finance a copy of the freight bill within ten days after the delivery in the state of each shipment. All dealers shall maintain and keep for a period of three years such other records of cigarettes or tobacco products received, sold or delivered within the state as may be required by the commissioner of taxation and finance. The commissioner of taxation and finance is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the stamping of cigarettes or the sale and delivery of cigarettes or tobacco products taxable under this article, as well as the stock of cigarettes or tobacco products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

(As amended L.1989, c. 61, § 79.)

§ 481. Penalties and interest

1. (a)(i)(A) An agent or distributor or other person treated as a distributor pursuant to section four hundred seventy-one-d who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due, not exceeding thirty per centum in the aggregate.

(B) If a tax on cigarettes or on tobacco products under this article is not paid when due by any other person, the person liable for the payment of such tax shall be subject to a penalty of fifty per centum of the amount of such tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure to pay continues after the expiration of the first month after such tax became due.

(C) In the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this paragraph shall not be less than the lesser of one hundred dollars or one hundred per centum of the amount required to be shown as tax on such return. For the purpose of the preceding sentence, the amount of tax required to be shown

on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(ii) If any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subparagraph shall not be paid if the amount thereof is less than one dollar.

(iii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause.

(iv) If the failure to pay any tax within the time required by or pursuant to this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of this paragraph, there shall be added to the tax (A) a penalty of fifty per centum of the amount of tax due, plus (B) interest on such unpaid tax at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter for the period beginning on the last day prescribed by this article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day on which such tax is paid, plus (C) for the period beginning on the last day prescribed by this

article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day the amount of tax due is finally determined or, if earlier, on the day on which such tax is paid, an amount equal to fifty per centum of the interest payable under clause (B) of this subparagraph on that portion of the unpaid tax which is attributable to fraud.

(v) The penalties and interest provided for in this paragraph shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax. Interest under this paragraph shall be compounded daily.

(b) In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. In addition, the commissioner may impose a penalty of not more than fifty dollars for each fifty cigars or one pound of tobacco or fraction thereof in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any person and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco or fraction thereof in excess of five hundred cigars or ten pounds of tobacco in the possession or under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed shall not exceed five thousand dollars in the aggregate. The commissioner may impose a penalty

of not more than fifty dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed shall not exceed ten thousand dollars in the aggregate. Any penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty. Such penalty shall be paid to the department of taxation and finance and disposed of as hereinafter provided with respect to moneys derived from the tax.

2. (a) The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars or more than five pounds of tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

(b) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing tobacco products or unstamped

packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of tobacco products or unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

3. For purposes of this chapter, the certificate of the commissioner of taxation and finance to the effect that a tax or fee imposed by this article has not been paid, that a return required by or under the provisions of this article has not been filed, or that information has not been supplied, as required by or under the provisions of this article, or that a bond or other security required by or pursuant to the provisions of this article has not been filed, or that books, accounts, records, memoranda, documents or papers have not been supplied as required by or pursuant to the authority of this article, or that a retail dealer or vending machine owner or operator is not currently or validly registered as required by this article shall be prima facie evidence that such tax or fee has not been paid, such return not filed, such information not supplied, such bond or other security not filed, that such books, accounts, records, memoranda, documents or papers have not been supplied, or that such retail dealer or vending machine owner or operator is not currently or validly registered.

4. Cross-reference: For criminal penalties, see article thirty-seven of this chapter.

§1814. Cigarette and tobacco products tax

(a) Attempts to evade or defeat tax.—(1) Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter or the payment thereof shall, in addition to other penalties provided by law, ~~be guilty of a misdemeanor.~~

(2) Any person who willfully attempts in any manner to evade or defeat the taxes imposed by article twenty of this chapter or payment thereof on (i) twenty thousand cigarettes or more (ii) twenty-two thousand cigars or more or (iii) four hundred forty pounds of tobacco or more or has previously been convicted two or more times of a violation of paragraph one of this subdivision shall be guilty of a class E felony.

(b) Willful failure to file a return or report, or pay tax.—Any person required under article twenty of this chapter to pay or make a return or report, who willfully fails to pay such tax or make such return or report, at the time or times so required, shall be guilty of a misdemeanor.

(c) Fraudulent returns, reports, statements or other documents.—(1) Any person who willfully makes and subscribes any return, report, statement or other document which is required to be filed with or furnished to the commissioner of taxation and finance or to any person, pursuant to article twenty of this chapter, which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor.

(2) Any person who willfully delivers or discloses to the commissioner of taxation and finance or to any person pursuant to article twenty of this chapter, any list, return, report, account, statement or other document known by him to be fraudulent or to be false as to any material matter shall be guilty of a misdemeanor.

(3) For purposes of this section, the omission by any person of any material matter with intent to deceive shall constitute the delivery or disclosure of a document known by him to be fraudulent or to be false as to any material matter.

(d) Any person, other than an agent so authorized by the tax commission, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor.

(e) Any person, other than an agent so authorized by the tax commission, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class E felony.

(f) For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. With respect to such possession or transportation any provisions of article twenty of this chapter providing for a time period during which a use tax imposed by such article may be paid on unstamped cigarettes or unlawfully or improperly stamped cigarettes or during which such cigarettes may be returned to an agent shall not apply. The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter.

(g) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, or lawfully transporting or storing tobacco products, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of unstamped or unlawfully stamped packages of cigarettes or possession or control of tobacco products, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

(h) Any willful act or omission, other than those described in subdivision (a),(b),(c),(d),(e),(f),(g),(i) or (j) of this section, by any person which constitutes a violation of any provision of article twenty of this chapter shall constitute a misdemeanor.

(i) Any person who falsely or fraudulently makes, alters or counterfeits any stamp prescribed by the tax commission under the provisions of article twenty of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such stamp, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited stamp, or knowingly and willfully possesses any cigarettes in packages bearing any such false, altered or counterfeited stamp, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any stamp, prescribed by the tax commission under the provisions of article twenty of this chapter, or who knowingly and willfully possesses any such device, shall be guilty of a class E felony. For the purposes of this subdivision, the words "stamp prescribed by the tax commission" shall include a stamp, impression or imprint made by a metering machine, the design of which has been approved by such commission.

(j)(1) Any dealer, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than ten pounds of tobacco or more than five hundred cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance

under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter, shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(2) Any person, other than a dealer or a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than fifteen pounds of tobacco or more than seven hundred fifty cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by the distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(3) Any person, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control twenty-five hundred or more cigars or fifty or more pounds of tobacco upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor. Provided further, that any person who has twice been convicted under this subdivision shall be guilty of a class E felony for any

subsequent violation of this section, regardless of the amount of tobacco products involved in such violation.

(4) For purposes of this subdivision, such person shall knowingly transport or have in his custody, possession or under his control tobacco or cigars on which such taxes have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance where such person has knowledge of the requirement of the tax on tobacco products and, where to his knowledge, such taxes have not been assumed or paid on such tobacco products by a distributor appointed by the commissioner of taxation and finance.

(k) Any person who falsely or fraudulently makes, alters or counterfeits a registration certificate or sticker required under the provisions of section four hundred eighty-a of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such registration certificate or sticker, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited registration certificate or sticker, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any registration certificate or sticker required under the provisions of such section, or who knowingly and willfully possesses any such device, shall be guilty of a class B misdemeanor.

New York Tax Law:

§1846. Seizure and forfeiture of cigarettes

(a) Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his special duties, shall discover any cigarettes subject to tax provided by article twenty of this chapter, and upon which the tax has not been paid or the stamps not affixed as required by such article, they are hereby authorized and empowered forthwith to seize and take possession of such cigarettes, together with any vending machine or receptacle in which they are held for sale. Such cigarettes, vending machine or receptacle seized by a police officer or such peace officer shall be turned over to the tax commission. Such seized cigarettes, vending machine or receptacle, not including money contained in such vending machine or receptacle, shall be forfeited to the state. The tax commission may, within a reasonable time thereafter, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited cigarettes and vending machines or receptacles at public sale and pay the proceeds into the state treasury to the credit of the general fund. Cigarettes so seized and sold shall be sold only to an agent under article twenty of this chapter and the notice of sale shall contain a provision to this effect. Notwithstanding any other provision of this section, the tax commission may enter into an agreement with any city of this state which is authorized to impose a tax similar to that imposed by article twenty of this chapter to provide for the disposition between the state and any such city of the proceeds from any such sale.

* * *

§1847. Seizure and forfeiture of vehicles or other means of transportation used to transport or for deposit or concealment of cigarettes

(a) Any peace officer designated in subdivision four of section 2.10 of the criminal procedure law, acting pursuant to his special duties, or any police officer designated in section 1.20 of the criminal procedure law may seize any vehicle or other means of transportation used to transport or for the deposit or concealment of more than one hundred unstamped or unlawfully stamped packages of cigarettes subject to tax under article twenty of this chapter, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as such common carrier and such vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.

* * *

20 NYCRR:

335.6 Indian nations or tribes, qualified Indian consumers and registered dealers. [Tax Law §§ 471, 471-a and 475](a) As provided for in this section and section 335.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers (as defined herein) may purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.

(b) (1) (i) *Qualified Indian* for purposes of this section means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) *Qualified Indian consumer* for purposes of this section means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian's own use or consumption (i.e. other than for resale) within such reservation.

(2) *Exempt Indian nation or tribe* for purposes of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) *Qualified reservation* for purposes of this section means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) *Registered dealer* for purposes of this section means:

(i) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on a qualified reservation; or

(ii) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on qualified reservations.

(5) *Qualified sale* for purposes of this section means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

(c) Although stamps are usually affixed to packages of cigarettes as evidence of payment of tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sales to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a

registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped packages of cigarettes are deemed to be unstamped packages of cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamps may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped packages of cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(d) *Exempt Indian nations or tribes.* (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for its own use or consumption, or for making qualified sales, provided that the nation or tribe:

(i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance;

(ii) takes delivery of the cigarettes on its qualified reservation; and

(iii) uses, or intends to use, such cigarettes for its own official use or consumption within such reservation, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the In-

dian nation's or tribe's exempt organization number referred to in section 529.9(b) of this Title.

(3) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(e) *Qualified Indian consumers.* (1) a qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual:

(i) takes delivery of the cigarettes on a qualified reservation; and

(ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(f) *Registered dealers.* (1) Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to such applicant, if the applicant:

(i) (*a*) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or

(*b*) is a qualified Indian, who is also a wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii) (*a*) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant; and

(*b*) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii) (*a*) provides evidence to the department that such applicant has complied (or will comply) with any applicable tribal regulations and/or licensing procedures; and

(*b*) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax. No fee is charged for this registration.

(3) A registered dealer may purchase cigarettes upon which the seller has no prepaid and precollected the ciga-

rette tax for purposes of making qualified sales, provided that the registered dealer:

(i) has received from the department a valid certificate of registration as a dealer of cigarettes;

(ii) takes delivery of such cigarettes within the boundaries of its qualified reservation; and

(iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the registration as a dealer of cigarettes.

(g) (1) The exemption certificates prescribed in subdivision (d), (e) and (f) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by

the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. In addition, such evidence of each exempt transaction must be retained by the seller and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating copies of these individual bills, invoices, receipts and other forms of written evidence of exemption from tax with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax return.

Historical Note
Sec. filed Oct. 17, 1989 eff. Nov. 7, 1989.

335.7 Qualified sales of cigarettes on qualified reservations. [Tax Law, §§471, 471-a, 475 and 481(2)]

(a) (1) The cigarette tax imposed pursuant to article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such cigarettes are ultimately purchased on such reservation by a qualified Indian for such Indian's own personal use or consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax since the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation, regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer, are subject to a state's cigarette excise tax.

(b) (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and

precollected for purposes of making qualified sales, if that agent—with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe—sells and delivers such cigarettes to:

(i) an exempt Indian nation or tribe;

(ii) a registered dealer; or

(iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette agent (and its employees) may possess cigarettes for sale in this State and transport such cigarettes onto a qualified reservation located in this State without prepaying and precollecting the cigarette tax. However, as provided in section 335.6 of this Part, subsequent qualified sales may be made solely on such qualified reservations. Properly completed exemption certificates must be received by all sellers of cigarettes, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval for delivery from that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) (1) If applicable, departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(2) In determining such probable demand, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified

Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the Federal Bureau of Indian Affairs).

(3) In determining such trade territory, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(4) In addition, the department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage

of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(5) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to subparagraphs (2)(ii) and (3)(ii) of this subdivision.

(6) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.6 of this Part. The possession within this State at any one time of more than 400 cigarettes in unstamped (or unlawfully stamped) packages by any Indian nation or tribe, qualified Indian consumer or registered dealer, except as provided herein, shall be presumptive evidence that such cigarettes are subject to tax. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes.

Historical Note

Sec. filed Oct. 17, 1989 eff. Nov. 7, 1989.

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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

QUESTION PRESENTED

Whether New York can impose supplementary tax and regulatory burdens on wholesale sales of cigarettes to Indian purchasers on Indian reservations, where Congress has pre-empted the field of regulating sales to Indians on reservations by enacting the Indian trader laws (25 U.S.C. §261 *et seq.*)?

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MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

—0—

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY

The respondents respectfully urge the Court to deny the petition for a writ of certiorari seeking review of the order of the New York Court of Appeals entered on June 10, 1993. The unanimous decision of the Court of Appeals is plainly correct and does not merit review.

The decision below expressly follows this Court's longstanding doctrine that state taxation and regulation of sales to reservation Indians are pre-empted by federal law. *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). The Court of Appeals unanimously ruled that New York's cigarette tax regulations could not be enforced against respondents' wholesale sales of cigarettes to Indians on Indian reservations because the regulations impermissibly imposed burdens in a field where Congress has pre-empted state regulatory authority through its enactment of the Indian trader statutes (25 U.S.C. §§261-264).

The Court of Appeals thoroughly considered this Court's opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). In *Potawatomi* the Court held that sovereign immunity prohibited a state from suing a tribe to collect cigarette taxes on retail sales. Wholesalers were not parties to that case and the pre-emptive effect of the Indian trader laws was not addressed. The Court of Appeals concluded that *Potawatomi* did not alter this Court's controlling pre-emption decision in *Warren Trading Post.*

The writ should be denied because the petition fails to raise a serious question of general importance not already authoritatively settled.

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The references to the parties to the proceeding, to opinions below, to statements of jurisdiction and to applicable statutes, as set forth in the petition for a writ of certiorari received by the respondents on September 7, 1993, are incorporated by reference herein.

STATEMENT OF THE CASE

Respondents Milhelm Attea & Bros., Inc.[1] and Elias H. Attea, Jr. are federally licensed Indian traders in the business of selling cigarettes at wholesale to Indians on various Indian reservations located in New York State.

The petitioners concede that the cigarette tax regulations at issue herein impose burdens upon the respondents' wholesale sales to Indians on Indian reservations. Under the regulations, the respondents are liable for and must collect state cigarette taxes on all sales to their Indian customers except for certain limited quantities determined by the Department of Taxation and Finance [20 NYCRR §335.7(b)(3)][2]. Prior approval of the taxing authority is required for each sale to an Indian on the reservation made without payment of the tax [20 NYCRR §335.7(c)(2)].

The regulations further restrict the quantities of untaxed cigarettes which the respondents may sell to Indians on reservations to quotas determined by the Department of Taxation and Finance [20 NYCRR §335.7(c) and (d)]. The wholesalers are required to collect cigarette taxes from the Indians for sales in excess of the quotas [20 NYCRR §335.6(f)(2)]. The location and quantity of the goods which the wholesaler may sell to Indians on the reservation are further restricted through a coupon rationing system administered by the

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[1] Respondent Milhelm Attea & Bros., Inc. respectfully states that it has no corporate parents, subsidiaries or affiliates. The "also known as" designations in the caption of this case are listed as a result of typographical errors contained in documents issued by or submitted to one or more of the petitioners.

[2] Section 335 of the New York cigarette tax regulations was renumbered Section 336 as of December 19, 1990, without any substantive change. To avoid confusion, the section numbers cited in the Appendix to the Petition are used herein.

Department of Taxation and Finance [20 NYCRR §335.7(d) and (e)]. The regulations also restrict respondents by permitting sales only to certain Indians required to be registered with the state as "registered dealers" [20 NYCRR §335.7(b)(1)]. Wholesalers selling amounts in excess of the state-imposed quotas must collect all applicable taxes from Indian purchasers and are liable for the tax due on such excess amounts.

In December, 1988, the respondents commenced separate actions in the New York State Supreme Court, Albany County, claiming that the regulations, to the extent they impose additional state burdens on the respondents' wholesale sales of cigarettes to Indians on Indian reservations, are pre-empted by the Indian trader statutes (25 U.S.C. §§261 *et seq.*). The trial court granted summary judgment to the respondents (A33-A43)[3] and was affirmed unanimously by the Appellate Division, Third Department (A19-A24).

After the New York Court of Appeals refused to review the initial determination in this case for lack of a substantial constitutional question, this Court granted the state's initial certiorari petition, and entered a summary reconsideration order vacating and remanding the case to the Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (A17-A18)."

[3] Unless otherwise noted, numbers in parenthesis following the letter "A" refer to the Appendix in the petition.

On remand, the Appellate Division reversed itself, despite expressly recognizing that Congress has pre-empted the field of regulating trade with Indians and that the federal pre-emption issue raised in the instant case was not before the Supreme Court in *Potawatomi* (A13-A16).

On June 10, 1993, the New York Court of Appeals reversed the Appellate Division (A3-A12). The Court of Appeals concluded that this Court's reference to wholesalers in *Potawatomi* "did not alter the established rule stated in *Warren Trading Post Company v. Arizona Tax Commission*, (*supra*, 380 U.S. at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them" (A10). The Court of Appeals, upon fully considering *Potawatomi*, stated: ". . . we do not read the Court's suggestions for collection remedies as altering the established law regarding federal pre-emption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers" (A11). Further, the Court of Appeals found that the tax regulations imposed "significant" burdens on the wholesalers' trade with Indians (A11).

REASONS FOR DENYING THE WRIT

A. The Court of Appeals followed controlling precedent establishing that Congress has pre-empted the field of regulating trade between Indian traders and Indian purchasers on Indian reservations.

The doctrine of *Warren Trading Post*, that the federal Indian trader laws pre-empt states from imposing tax, regulatory or other burdens on sales to reservation Indians, is a longstanding tenet of federal Indian law. In *Central Machinery*, decided some 15 years after *Warren Trading Post*, the Court reaffirmed that holding and reminded states seeking to tax or regulate such transactions that only Congress could grant relief by repealing or amending the federal Indian trader laws. 448 U.S. at 166. Thus, the instant case does not present an appropriate case for review. It is simply another situation wherein a state seeks to impose tax and regulatory burdens upon a field reserved to federal control.

New York's cigarette tax regulations plainly interfere with the federal regulatory scheme. The regulations comprehensively regulate the wholesale distribution of cigarettes to Indians on reservations. Not only does New York seek to require wholesalers to collect, and their Indian customers to pay, state taxes on all but certain limited quantities of cigarettes sold on the reservation, but the regulations also control the price and quantities of cigarettes sold to Indians, and restrict wholesalers to selling only to particular Indians who must register with the state and only at particular locations on the reservation. The regulations even require tribes to obtain "exemption certificates" from New York. The Court of Appeals found the state regulatory burdens to be "significant" in that, *inter alia*, "they dictate to Indian

traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade" (A11).

The Court of Appeals fully observed past precedent, and its decision was clearly correct. The Court of Appeals carefully distinguished *Moe v. Confederated Salish & Kooteani Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), relied on by petitioners, as cases dealing with *retail sales* to *non-Indians*, transactions not within the scope and pre-emptive effect of the Indian trader laws (A8).

The Court of Appeals also carefully analyzed this Court's opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and distinguished that decision as being based on the doctrine of sovereign immunity, not the pre-emptive effect of the Indian trader statutes (A9). The Court of Appeals noted that *Potawatomi* cited "none of the relevant decisions in this area" (*i.e.* federal pre-emption), and concluded that the petitioners' interpretation of *Potawatomi* is "contrary to the present state of the law on the subject" (A10).

Any other result would have produced confusion. Under *Warren Trading Post* and its progeny, the pre-emption of state laws regarding trade with Indians on reservations is unquestioned. To create exceptions to such a fundamental proposition based on a case such as *Potawatomi*, which does not even mention the Indian trader statutes, federal pre-emption or the controlling cases, would be incongruous and raise questions in other settled areas of federal Indian law.

In *Central Machinery*, this Court stated as follows:

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a "sweep as broad as [their] language". 448 U.S. at 166.

Although Congress has had almost 30 years to change the decision in *Warren Trading Post*, Congress has not chosen to do so. *See Hilton v. South Carolina Public Railways Commn.*, _____ U.S. _____, 112 S.Ct. 560, 564 (1991); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we [the Supreme Court] have done").

In the absence of a conflict with prior decisions of this Court, and since the holdings in *Warren Trading Post* and *Central Machinery* completely dispose of the issues raised herein, the petition should be denied for lack of a substantial federal question. *See, Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952). *See also* Sup. Ct. R. 10.

B. Petitioners misstate the decisions in *Moe, Colville* and *Potawatomi*, attempting to create a conflict where none exists.

There are two independent barriers to the assertion of state regulatory authority over activities being conducted on Indian reservations. The first is the doctrine of federal pre-emption. The second is the doctrine of tribal sovereignty or the right of a tribe to govern itself. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). As this Court observed in *White Mountain*, "[they] are independent because either

standing alone can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." 448 U.S. at 143.

The instant case turns on federal pre-emption, not the permissible limits of state intrusion on tribal sovereignty. This distinction is critical. Where the activity sought to be regulated by the state is pre-empted by federal law, the bar to state regulation or taxation is absolute. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *see also Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

However, where the activity is not the subject of a pre-emptive federal regulatory scheme, and the sole consideration is that of safeguarding tribal sovereignty, the imposition of minimal state burdens on the tribe may be permitted where there is a valid state interest. *Moe v. Confederated Salish & Kooteani Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

In an effort to avoid the controlling federal pre-emption decisions, the petitioners attempt to blend and confuse the case law concerning federal pre-emption with the legal authorities pertaining to tribal sovereignty, and combine the independent and distinct wholesale and retail transactions[4]. Petitioners make numerous misleading references throughout the petition to instances where "Indian traders" were subjected to state

[4] The claim at page 18 of the Petition that the holding herein affects "every transaction between an Indian tribe and its supplier" is wrong. The holding is limited to wholesale sales to Indians on reservations. Other transactions including sales off the reservation were not at issue.

regulation. However, in all such cases, the state burdens pertained to retail sales to non-Indians, matters outside the scope of the Indian trader laws. As to those transactions, the vendor's status as an "Indian trader" was irrelevant, and the sole consideration was whether the state's requirements violated tribal sovereignty.

In *Colville* the Court explained *why* the Indian trader statutes did not pre-empt regulation of tribal smokeshop retailers who also happened to be licensed Indian traders:

> The Indian trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate *businesses selling goods to reservation Indians* for cash or exchange, *see Warren Trading Post Company v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), *but no similar intent is evident with respect to sales made by Indians to non-members of the Tribe.* 447 U.S. at 155-56, 100 S.Ct. at 2082. (Emphasis supplied.)

The New York Court of Appeals expressly recognized this important difference (A8). Unlike the "Indian traders" in the *Colville* case, respondents' sales on Indian reservations are made at wholesale solely to reservation Indians and are thus covered by the Indian trader statutes. Hence, the Court of Appeals held that state regulations of such transactions is pre-empted by federal law.

None of the cases cited by the petitioners sanctioned pre-payment of a state tax by an Indian vendor to his wholesale supplier, as suggested at pp. 23-24 of the Petition. In *Moe* the Supreme Court held that "... the state may require the Indian proprietor simply to add the tax to the sales price and thereby aid the state's collection and enforcement thereof." 425 U.S. at 483.

Neither the Supreme Court nor the district court in *Moe* passed on or endorsed the application of the pre-payment provisions of the Montana tax statute as argued by the petitioner. 425 U.S. at 468, n.6. Indeed, the Court's holding expressly stopped short of such a requirement. *Id.* The only "collection requirement" of the Montana law approved by the Court was at the *retail* level.

In *Colville*, the Court held that the Indian retailer could be required to purchase *from the state* a quantity of tax stamps and affix such stamps to individual packages of cigarettes at the time of sale of such cigarettes to non-members of the tribe. 447 U.S. at 159, 100 S.Ct. at 2084. This requirement was completely independent from the wholesale purchase of such cigarettes by the Indian vendor from his supplier.

Indeed, in *Colville*, the Court expressly recognized that the Indian vendors therein were not required to pay state taxes to their supplier:

> Essentially, the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. ... Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser. *Colville, supra*, 447 U.S. at 142, fn. 9.

In *Potawatomi*, where federal pre-emption was not at issue, the Supreme Court merely confirmed that limited state regulation of *retail* sales to non-Indians such as permitted in *Moe* and *Colville* is not barred by tribal sovereignty principles:

> Those cases [*Moe* and *Colville*] stand for the proposition that the doctrine of sovereign immunity does not prevent a State from requiring *Indian*

> *retailers* doing business on tribal reservations to *collect* a state-imposed cigarette tax on their sales to non-members of the Tribe. *Potawatomi*, 498 U.S. at 513 (emphasis supplied).

The Court of Appeals extensively discussed the *Potawatomi* case and determined that *Potawatomi* did not change the federal pre-emption principles applicable to the issue presented here. Moreover, the Court of Appeals found, under the facts of this case, that the regulations "imposed significant burdens on the wholesaler," negating any "minimal burdens" argument in any event (A11-A12).

C. New York has alternate remedies, and may also seek appropriate legislation from Congress.

The petitioners contend that the collection of the tax at the wholesale level is necessary to prevent tax evasion by non-Indian retail customers, offering completely speculative and unsubstantiated estimated losses which the petitioners admit were not a part of the record below.

Similar tax evasion arguments were rejected in North Dakota's recent unsuccessful attempt to convince this Court that states may, notwithstanding the Interstate Commerce Clause, impose sales and use taxes on transactions in interstate commerce between out-of-state mail order distributors and retail customers within the state. *Quill Corp. v. North Dakota*, 504 U.S. _____, 112 S.Ct. 1904 (1992).

In any event, petitioners have alternate remedies. The narrow holding in this case does not prevent the petitioners from enacting proper regulations applicable to retail purchases by non-Indian retail customers. The cases relied on by petitioners, *Moe, Confederated Tribes* and *Potawatomi*, all sanctioned minimal state burdens at the retail level.

Also, New York may negotiate tax agreements with Indian tribes. In 1988, New York negotiated such an agreement with the Seneca Nation of Indians, but it was not ratified. Perhaps different terms may be explored.

Finally, if these alternatives are not satisfactory, New York may seek relief from Congress. The Court has consistently refused to intrude upon the Congressional function of balancing interests and imposing burdens among various federal, state, tribal, and private interests in the area of trade with Indians on reservations:

> Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interest is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress. *Washington v. Confederated Tribes of Colville Indian Reservation, supra*, 447 U.S. 134, 177 (1980) (concurring opinion of Rehnquist, *J.*).

Indeed, the various arguments of competitors highlight the inherently political nature of the various interests to be balanced. The proper forum for balancing such considerations is Congress, not this Court.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: October 6, 1993

Respectfully submitted,

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Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE EMPIRE STATE PETROLEUM ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Dated: October 4, 1993

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(3417—LC10-568—1993)

No. 93-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

Motion for Leave to File Brief *Amicus Curiae* in Support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York

The Empire State Petroleum Association, Inc. (ESPA) respectfully moves this court pursuant to Supreme Court Rule 37.2 for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari. The petitioner has consented to the filing of this brief. Consents of the two respondents were requested but refused. ESPA previously participated and filed briefs as *amicus curiae* over respondents' objections before the Appellate Division of the New York State Supreme Court, Third Department on this Court's remand of this matter for further consideration, and also before the New York State Court of Appeals on the appeal of the Appellate Division opinion and order.

Interest of the *Amicus Curiae*

The Empire State Petroleum Association, Inc. is a New York not-for-profit trade association representing approximately 450 individual member companies engaged in supplying and marketing refined petroleum products and re-

lated services to consumers throughout the State of New York.[1] ESPA's membership is predominantly comprised of independent wholesale and retail distributors of gasoline, diesel fuel, heating oil, and other petroleum based products. ESPA members who are engaged in motor fuel distribution or who own or operate retail service stations, particularly in the central and western regions of New York State, compete with Indian retailers for the sale of motor fuels to non-Indians. ESPA dealers and service station operators collect and remit to the State Department of Taxation and Finance motor fuel taxes on the sale of products to consumers. In contrast, Indian retailers refuse to pay these taxes on sales of motor fuel products to non-Indians although such taxes are lawful and are required to be collected. Consequently, Indian retailers enjoy a tremendous price advantage on the sale of their products, a price advantage with which our members cannot compete.

ESPA's purpose in filing this motion and the accompanying brief is to bring to the Court's attention matters of significant public importance which will not be presented by the parties. Specifically, the final outcome of this case will not only determine the validity of the state's cigarette tax regulations, but will also impact upon similar motor fuel tax regulations, and ultimately the competitive viability of ESPA's members. In addition, ESPA believes that the case has widespread implications concerning the state's ability to balance delicately the sovereign rights of an Indian nation with its own lawful right to collect taxes on sales to non-Indians, and the effect of such efforts by the state upon competing businesses, the public and the local economies.

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[1]ESPA has no parent or subsidiaries to list pursuant to Rule 29.1.

The cigarette tax scheme at issue in this case (20 NYCRR Parts 335.6 and 335.7)[2] was designed to alleviate tax evasion which occurs on the sale of cigarettes on Indian reservations to non-Indians. The regulations are nearly identical to motor fuel tax regulations of the Department (20 NYCRR Parts 414.6 and 414.7) which were likewise created to prevent the tax-free sales of motor fuel products on Indian Reservations to non-Indians by Indian retailers. Both the cigarette and motor fuel tax schemes were simultaneously prepared, published for public comment and promulgated. Both sets of regulations became effective in November of 1988.

The similarity between the two schemes has been recognized by the New York courts. In *Matter of New York State Department of Taxation and Finance v. MacLeod*, 168 AD2d 802 (3d Dept. 1990) the Appellate Division held that New York's motor fuel tax scheme was invalid based upon its own previously issued opinion in this case involving the very cigarette tax regulations at issue here. See *Milhelm Attea and Brothers v. Taxation and Finance*, 164 AD2d 300 (3d Dept. 1990). Consequently, this Court's decision whether to grant certiorari and hear argument on the validity of the cigarette tax scheme will directly affect the related motor fuel regulations and ultimately the economic viability of our members.

The failure of Indian retailers to collect state taxes on sales to non-Indians not only deprives New York of tax revenue to which it is lawfully entitled, but oppresses competition and harms legitimate operators who collect state

[2]In December of 1990, these regulations were renumbered without any substantive change. Former numbering is used here to avoid confusion in reviewing the state court opinions.

and local taxes on motor fuels and cigarettes. A gallon of gasoline costing $1.25 can be sold without state taxes for 32 cents less. A carton of cigarettes without state taxes is over five dollars cheaper. With these illegal price "discounts", competing businesses continue to lose non-Indian patronage to Indian retailers who openly market the sale of their tax-free products. The loss in motor fuel tax revenue has been estimated to be $35 million annually (Petition, p. 12, footnote 5). This is only a fraction of the loss in motor fuel sales that would otherwise be made by non-Indian businesses who collect taxes.

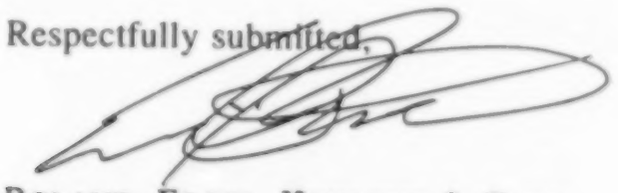
The motor fuel and cigarette tax schemes were crafted by the department to provide for the fair and equitable application and collection of state taxes on sales to non-Indians. In doing so, the regulations do not curtail the sale of tax-free products to Indians on reservations and only place minimal recordkeeping requirements upon Indian traders. If upheld, the state can prevent pervasive tax evasion while simultaneously restoring a fair, open and competitive environment to the retail motor fuel market.

As indicated in the petition, certiorari should be granted due to the inherent conflict between the New York Court of Appeals' decision and this Court's prior opinions. The parties to this matter are properly concerned with establishing their legal points as to the propriety and necessity for the granting of certiorari. ESPA, however, respectfully requests that the Court also give consideration to the broader public policy aspects of this case in determining whether to grant certiorari. The accompanying brief is submitted with the intention that it will assist the Court by bringing these matters to its attention.

WHEREFORE, the Empire State Petroleum Association, Inc. respectfully requests that this Motion for leave to file the annexed brief *amicus curiae* be granted.

Dated: Albany, New York
October 4, 1993

Respectfully submitted,



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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

BRIEF OF THE EMPIRE STATE PETROLEUM ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

Brief of the Empire State Petroleum Association, Inc. as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York

Preliminary Statement

This brief is filed on behalf of the Empire State Petroleum Association, Inc. (ESPA) as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of New York which was filed by the New York State Attorney General on September 7, 1993.

Interest of the *Amicus Curiae*

The interest of the Empire State Petroleum Association, Inc. (ESPA) is set forth in its motion for leave to file this *amicus curiae* brief, to which motion this brief is annexed.

Summary of Argument[1]

Certiorari should be granted in this matter for two reasons. First, the Court of Appeals' ruling is at odds with this court's prior opinions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and most recently, *Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). It was the *Potowatomi* case which this court ordered the Appellate Division to consider on remand of this matter (Petition A17-A18). In addition, ESPA believes that matters of public importance, which go beyond the state's lawful right to collect taxes on sales of products to non-Indians, warrants the granting of certiorari. Specifically, the method by which the state can lawfully prevent tax avoidance by non-Indians will significantly impact the economic viability of competing businesses, and possibly that of surrounding communities as well.

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[1]ESPA respectfully incorporates by reference the statement of the case as contained in the Petition.

ARGUMENT

I.

The Petition for Certiorari should be granted since a review of the merits and a decision of this Court will have significant public policy implications

ESPA respectfully submits that certiorari and a decision on the merits is warranted in this case because it involves matters of great public importance. A ruling of this court would not only settle the inherent conflict between the Court of Appeal's decision and this Court's prior decisions, but would also establish the parameters within which the state may lawfully enforce its right to collect taxes on sales to non-Indians in harmony with federal Indian laws, including those relating to Indian traders (25 U.S.C. §262 *et seq.*).

As noted in the accompanying motion, ESPA is concerned with the validity of motor fuel tax regulations (20 NYCRR 414.6 and 414.7) which are similar to the contested cigarette tax regulations here. This Court's decision will naturally determine the legal status of the motor fuel regulations promulgated by the state to prevent motor fuel tax evasion by non-Indians.

Without question, the state is entitled to payment of taxes on sales of taxable products sold by Indians to non-Indians and may even regulate Indian retailers on reservations to collect such taxes. *Potowatomi*, 498 U.S. 505, 512. It is the method of securing the collection and payment of those taxes that has proven difficult.

Attempts to enlist the aid of Indian retailers or Indian nations have not been successful, and prior regulations have been struck down by the New York Court of Appeals (*Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 NY2d 536 [1987] and 72 NY2d 720 [1988]). In response, the state carefully designed cigarette and motor fuel tax structures that provide for the fair application and collection of state taxes on sales to non-Indians while only minimally burdening Indian traders. (20 NYCRR 414.6 and 414.7—motor fuel; 20 NYCRR 335.6 and 335.7—cigarettes). ESPA has long supported the development and implementation of an equitable motor fuel tax scheme which insures that all members of industry and the consumer pay their proportionate share of taxes and that no one is permitted to avoid taxes illegally. Nonetheless, without these regulations, the avoidance of tax will continue unabated to the detriment of the state, its businesses, and its citizens.

The avoidance of tax on the sales of cigarettes and motor fuels is a serious problem. The state reports tax revenue losses of approximately $65 million in cigarette taxes per year and approximately $35 million in motor fuel taxes each year because of reservation sales to non-Indians.[2]

The temptation for non-Indians to purchase motor fuel products from a reservation is enticing given the price discrepancy when taxes are not charged on the sale. A gallon of gasoline which costs a $1.25 includes approximately 50 cents in taxes, of which 32 cents are attributable to state taxes. A gallon of diesel which costs a $1.35 includes approximately 60 cents in taxes, of which 35 cents are

[2]Even these figures may be underestimated. As the petition notes, the estimate is based only on those suppliers who responded with figures. (See Petition, p. 12, fn. 5.)

attributable to state taxes. A 32 or 35 cents per gallon price advantage is a margin with which our members cannot compete.[3]

Since many state highways and roads traverse reservations, there are numerous sites offering tax-free sales of cigarettes and motor fuels. Those members of ESPA who operate retail gasoline service stations located around or near Indian reservations and those members who distribute and supply motor fuel and other products to those service stations are suffering economic losses from the tax-free sales made on motor fuel products sold on Indian reservations to non-Indians. According to ESPA, some of its members have been forced out of business, while others are in jeopardy of becoming so. Some have downsized due to considerable loss of business. Distributors and service station operators cannot compete with Indian retailers who do not collect and pay state taxes and who aggressively and openly market this fact to customers.

While the threat to small business is continuing, it is not solely limited to service station dealers. The loss or downsizing of retail service station dealers carries further broad based detrimental economic impacts. The loss of stations would mean the loss of service to the public, a decrease in competition among service station operators, and less choice of products, service, and retail establishments to the consumer. The closing of service stations results in the attendant loss of revenue, both from the retail business and its employees, to the region, and an increase in unemploy-

[3]ESPA's members further suffer in damage to their reputation. Despite widespread publicity, ESPA reports that many consumers erroneously believe that the honest marketer is overcharging the customer in the sale of motor fuel products.

ment of workers. Thus, the avoidance of tax has a direct and immediate adverse impact upon the counties, towns, villages and other local political subdivisions of the state.

The adverse effects of these tax-free sales have an even greater geographic implication. Since tractor trailers typically can carry over 200 gallons of fuel, they can fill up with tax-free motor fuel on a reservation in Western New York and have sufficient fuel to travel to Boston, for example, and return without refueling, bypassing all the stations and truck stops along the way. Understandably, those operators would suffer economic losses.

ESPA respectfully emphasizes that this Court's ruling concerning the validity of these regulations will not only impact upon sales of motor fuels and cigarettes, but ultimately any other product which is or could be sold on reservations to non-Indians. Indian reservations are located throughout the state, including Northern New York and Long Island. Without doubt, other Indian nations and entrepreneurs within the state will monitor this Court's decision. Should the Court refuse to hear the merits of this matter, and affirm the validity of the regulations, it will essentially permit tax evasion to take place throughout the State of New York, and enhance the prospects of additional tax evasion with respect to many products and services taxed by the state previously not offered by Indian retailers to non-Indians.

II.

The Petition For Certiorari should be granted since the Court of Appeals decision is in direct conflict with the decisions of this court permitting states to impose minimal burdens on Indian traders to prevent the avoidance of tax by non-Indian purchasers of products from Indian retailers

Relying mostly on its previous opinion in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 NY2d 536 (1987) and 72 NY2d 720 (1988), the New York Court of Appeals found New York's cigarette tax regulations invalid under a rigidly applied preemption test because the respondents are Indian traders. However, as this Court noted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989):

> "Questions of pre-emption in the [area of Indian affairs] are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by 'mechanical absolute conceptions of state or tribal sovereignty.' [Citation omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. *Each case 'requires a particularized examination of the relevant state, federal and tribal interests'* " [Citation omitted] (Emphasis supplied).

It is respectfully submitted that in reviewing the subject regulations, the Court of Appeals did not perform such an examination but rather adhered to its prior *Herzog*

determinations, in direct conflict with this Court's decisions in *Moe, Colville* and *Potowatomi*. In *Colville*, this Court confirmed its prior decision in *Moe* stating that state excise and sales taxes on cigarettes could be collected on non-Indian purchases made on Indian reservations. 447 U.S. at 151. Indian retailers, therefore, could be required to collect such taxes on their sales to non-Indians. This Court's *Colville* opinion contains several pertinent points. First, this Court approved the imposition of regulatory record-keeping requirements upon operators of Indian smokeshops, who were licensed Indian traders, to assist in the collection of a properly imposed state tax. Perhaps most significant was that this Court recognized and validated a state's power to seize shipments of unstamped cigarettes travelling to the reservation from out-of-state suppliers even though the tribal businesses were "concededly exempt from state taxation, [and] no state tax is due when the cigarettes are in transit." 447 U.S. at 161. This Court continued:

> "We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the tribes, as here, have refused to fulfill collection and remittance obligations which the state has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. [Citation omitted] By seizing cigarettes en route to the reservation, the state polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests."

447 U.S. at 161-162.

If the *Colville* holding is not in direct contravention to the conclusion of the Court of Appeals ruling below (i.e., that the Indian trader laws automatically place every trader beyond state regulatory authority) then this Court's ruling in *Potowatomi* paints an even sharper contrast.

Relying on *Colville* and *Moe*, this Court ruled in *Potowatomi* that the Indian tribe's sovereign immunity did not prevent the State of Oklahoma from taxing cigarette sales to non-Indians at the tribal store. Furthermore, it was stated that the tribe has an obligation to assist in the collection of validly imposed state taxes on such sales. 498 U.S. at 512. While this Court explicitly recognized that Indian sovereign immunity could bar the State of Oklahoma from pursuing a lawsuit directly against the tribe for the tax imposed, it noted that there existed adequate alternate remedies to the state. Among those suggested was the collection of the state tax from cigarette wholesalers:

> "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of tribe are not liable for damages in actions brought by the State. See, *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, (Colville, supra,* 447 U.S. at 161-162), *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v. Oklahoma Tax Commission,* 898 F.2d 122 (CA10 1990) . . ." (Emphasis added.)

498 U.S. at 514.

This Court thus recognized that vendors engaged in trade with Indian tribes on reservations are not automatically absolved or immune from complying with duly promulgated state tax regulations intended to ensure tax payment for sales made to non-Indians. In addition, the state is empowered to use such traders to assure that the proper taxes are, in fact, collected and remitted. The imposition of such a duty upon vendors trading with Indians is, in fact, a minimal burden permissible under the balancing of federal, Indian, and state interests.

The Court of Appeals opinion improperly distinguishes *Potowatomi* on a ground not considered or mentioned by any of this Court's opinions. Specifically, the Court stated that the remedies listed in *Potowatomi* "might somehow be used to retroactively collect taxes unpaid on past sales" (Petition A11) but did not permit the state to exercise prospective regulatory authority over Indian traders. This distinction does not appear in this Court's *Potowatomi* decision, and neither is it logical. Whether a state possesses the right to place minimal burdens upon an Indian trader will not be altered or influenced by the fact that such burden is prospective or retroactive.

The Court of Appeals further ruled that even if minimal burdens were permissible, the instant tax regulations impose "significant" burdens which require their invalidation. This ruling is in error since, when compared to the tax scheme approved by this court in *Colville*, Washington State's record keeping requirements were more pervasive and yet, were still approved by this Court.

The refusal to grant certiorari will permit the avoidance of tax in contravention of principles of sound public policy and federal law. As this Court has stated:

> "We do not believe that principles of federal Indian Law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Colville, 447 U.S. at 155.

Conclusion

For the reasons stated above, the state's Petition for a Writ of Certiorari should be granted.

Dated: Albany, New York
October 4, 1993

Respectfully submitted,

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Petitioners,

vs.

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Respondent.

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Petitioners,

vs.

ELIAS H. ATTEA, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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OCTOBER TERM, 1993

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The New York State Association of Tobacco and Candy Distributors ("Association" or "*Amicus*") hereby respectfully moves this Court for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari of the Department of Taxation and Finance of the State of New York and James

W. Wetzler, Commissioner of Taxation and Finance of the State of New York.

The Petitioners have consented to the filing of a brief *amicus curiae* in these cases. Respondents' counsel have not consented.

The Association is a New York not-for-profit corporation representing approximately 70 distributors of cigarettes in New York State. Its members sell to chain stores, other wholesalers, and retailers, and distribute approximately 80% of all cigarettes sold in New York State.

The Association has a direct and vital interest in the continued viability and enforcement of the regulations at issue in these cases. Many of the Association's members compete directly with licensed cigarette agents and other wholesalers that do not collect cigarette taxes on cigarettes sold to retail outlets on Indian reservations in New York State for resale to non-Indian purchasers. Agents and other wholesalers that do not purchase and affix the required tax stamps on packages of cigarettes sold for resale to non-Indians evade the collection of $5.60 in cigarette taxes on every carton of cigarettes sold to Indian retailers for resale to non-Indian purchasers in New York State. Those agents and wholesalers thereby enjoy an unlawful competitive advantage over Association members that pay and collect the required tax on all of their cigarette sales within the State, resulting in an annual loss of revenue to Association members and other legitimate agents from the sale of untaxed cigarettes to non-Indians by retailers on Indian reservations which the Association estimates is well in excess of $205 million.

While *Amicus* seeks the same result in these cases as do the Petitioners, it believes that based upon its knowledge of the functioning and economics of the cigarette distribution industry in New York, arguments presented by *Amicus* would be of particular assistance to the Court in facilitating an understanding of the industry and of the purpose and effect of the regulations at issue. *Amicus* therefore believes that its participation would assist the Court in the disposition of these cases.

If the writ is granted, the Association intends to file a brief *amicus curiae* on the merits.

Dated: New York, New York
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Respectfully submitted,

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BRIEF

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No. 93-377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK; JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

ELIAS H. ATTEA, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The New York State Association of Tobacco and Candy Distributors, Inc. ("Association" or "*Amicus*") submits this brief as *Amicus Curiae* in support of the petition for a writ of certiorari of the Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York.

INTEREST OF *AMICUS CURIAE*

Amicus is a New York not-for-profit corporation representing approximately 70 distributors of cigarettes in New York State. A list of the Association's members is set forth in the Appendix to this brief.[1] Its members sell to chain stores, other wholesalers, and retailers and distribute approximately 80% of all cigarettes sold in New York State.

The members of the Association generally sell only cigarettes, candy and related products. The Association's members purchase cigarettes directly from cigarette manufacturers and affix the required New York State and City excise tax stamps, purchasing the tax stamps at face value and recovering their cost when the cigarettes are sold, and are licensed tax agents of the State and City of New York for the collection of taxes on the sale of cigarettes within the State.

These cases represent an attempt to enjoin the enforcement of regulations, adopted by the Commissioner of Taxation and Finance in August, 1988, that were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations in New York State. In essence, the regulations permit retail dealers of cigarettes on qualified Indian reservations to purchase sufficient quantities of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time attempt to ensure that if they wish to make sales of cigarettes to non-Indians, they have a sufficient supply of taxed and stamped packages of cigarettes for that purpose. The regulations limit the sale of unstamped cigarettes to retailers at reservation outlets that have registered with the Department of Taxation and Finance. In addition, they limit the quantities of unstamped cigarettes that a reservation retailer may purchase or sell to an

[1] Two of the Association's members, Day Wholesale, Inc. and Milhelm Attea & Bros., Inc., the respondent in one of the cases, do not join in the motion and brief *Amicus Curiae* of the Association.

amount which is no greater than the maximum legitimate Indian consumption of the reservation on which the retailer is located. 20 N.Y. Comp. Codes R. & Regs. §§ 336.6 (f) and (g) and 336.7 (b), (c) and (d) (1992).

The Association has a direct and vital interest in the continued viability and enforcement of these regulations and, therefore, in the outcome of these cases. Many of the Association's members compete directly with licensed cigarette agents and other wholesalers that do not collect cigarette taxes on cigarettes sold to retail outlets on Indian reservations in New York State for resale to non-Indian purchasers. The tax on cigarettes in New York State is currently 56 cents on every package of 20 cigarettes sold. N.Y. Tax Law § 471(1) (McKinney Supp. 1993), *as amended by* 1993 N.Y. Laws ch. 57, § 53 (McKinney) (effective June 1, 1993). Agents and other wholesalers that do not purchase and affix the required tax stamps on packages of cigarettes sold to retailers at reservation outlets for resale to non-Indians evade the collection of $5.60 in cigarette taxes on every carton of cigarettes sold to Indian retailers for resale to non-Indian purchasers in New York State and thereby enjoy an unlawful competitive advantage over competing Association members and other legitimate agents that pay and collect the required tax on all of their cigarette sales within the State.

Indian retailers, in turn, aggressively market their exemption from State taxation to non-Indians who do not enjoy such an exemption, thereby achieving an unfair and inequitable price advantage over non-reservation businesses. As a result of an increase in State taxes on cigarettes of nearly 167% over the past five years, cigarette taxes have become an increasingly large percentage of the average wholesale price of a carton of cigarettes sold in New York, resulting in an increasingly unfair competitive burden on legitimate agents and other wholesalers. At the current average wholesale price of approximately $16.00 a carton, the cigarette tax imposed represents 35% of the average wholesale price of cigarettes sold within the State.

At the same time, violations of the State's regulations with respect to the possession, transportation and sale of cigarettes by reservation retailers within the State and by their off-reservation suppliers, have grown at an ever-increasing rate. Consequently, the State's ability to monitor the movement and distribution of cigarettes throughout the State has been severely hampered and the corresponding opportunity for evasion by reservation retailers and their suppliers of the sales and cigarette taxes imposed on non-Indian consumers within the State has become increasingly difficult to detect and prevent. The evasion of State taxes on reservation sales of cigarettes to non-Indian purchasers upon whom the State has the indisputable right to impose taxes assumes two distinct forms. The first involves supplying untaxed cigarettes to reservation outlets for direct sale to purchasers who either consume or resell the product within the State without paying the applicable taxes. The second entails using locations on Indian reservations as delivery and storage points for large volumes of untaxed Canadian and American brands of cigarettes, a portion of which is believed to be ultimately smuggled back into Canada, with the remaining portion being diverted to distribution and consumption in New York State.

Based upon a study undertaken in early 1993 by the Office of Tax Policy and Analysis of the Department of Taxation and Finance, the State estimates that the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets has resulted in the loss to the State of an estimated $50 million in excise tax on cigarettes and $15 million in sales and use taxes annually. These figures include only a portion of the losses attributable to bootlegging and unlawful exports of cigarettes from Canada through Indian reservations into New York. They also do not take into account sales by out-of-state suppliers not licensed by the Department, nor do they reflect the recent increase in the tax on cigarettes in New York State from $3.90 to $5.60 a carton. The Association believes that the actual loss in taxes annually to the State because of reservation sales of cigarettes to non-Indians is substantially higher. The industry estimate for lost State and local taxes on cigarettes sold on Indian

reservations is more than twice this amount. *See* Testimony of Robert W. Reid, Executive Director, Independent Petroleum Marketers of New York, at the Joint Legislative Hearing before the New York State Senate Standing Committee on Corporations, Authorities and Commissions and the New York State Assembly Subcommittee on Corporate Law, at 2 (May 27, 1992) (estimating lost State and local taxes on gasoline, diesel fuel and cigarettes sold on Indian reservations of in excess of $200 million).

According to the State's figures for the fiscal year ended March 31, 1993, the State collected approximately $543.9 million in excise tax on cigarettes alone. Thus, the $50 million in uncollected cigarette excise tax on the sale of unstamped cigarettes by reservation retailers represents approximately 8% of the taxable market.

In calendar year 1991, cigarette tax agents reported 10.6 million cartons of cigarettes sold on Indian reservations. During the fiscal year ended March 31, 1993, the Department of Taxation and Finance estimates that this figure increased to approximately 12.8 million cartons of cigarettes sold by licensed agents and wholesalers on Indian reservations – almost *100 times* the amount estimated to have been consumed (on average) by every enrolled Indian man, woman and child during that period. If all 12.8 million cartons estimated to have been sold on reservations during this period were consumed by enrolled Indians on reservations, every man, woman and child would have had to have consumed on average 12,800 packs of cigarettes (approximately *35 packs per day*) – as compared to the New York average of 130 packs of cigarettes a year – an amount almost 100 times the New York average. These figures represent estimates of only those cigarettes that *licensed* agents and wholesalers sold on Indian reservations over the past year. The actual amounts of unstamped cigarettes entering Indian reservations are undoubtedly far greater because unlicensed wholesalers do not file monthly reports or returns with the Department and the estimated figures do not fully take into account illegal bootlegging.

The unfair and inequitable competitive disadvantage to the Association's members that compete directly with licensed agents and other wholesalers who do not collect cigarette taxes on cigarettes sold to retail outlets and Indian reservations for resale to non-Indian purchasers has forced numerous legitimate agents and wholesalers to merge with other companies or go out of business altogether, with a resulting loss of business and jobs throughout large areas of the State. Based upon the State's conservative estimate of a $65 million loss to the State in cigarette, sales and use taxes annually – a loss that the Association believes to be significantly greater – the annual loss in revenue to Association members and other legitimate agents from the sale of untaxed cigarettes to non-Indians by retailers on Indian reservations is in excess of $205 million. Unless these regulations are upheld and enforced, legitimate wholesalers will continue to face unfair competition by agents and other wholesalers who evade their tax obligations.

While *Amicus* seeks the same result in these cases as does the State, it believes that its knowledge of the functioning and economics of the cigarette distribution industry in New York would be of particular assistance to the Court in facilitating an understanding of the industry and the purpose and effect of the regulations at issue.

ARGUMENT

Summary

The petition for a writ of certiorari should be granted because the decision of the New York Court of Appeals is in direct conflict with the decisions of this Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and this Court's order in this case (112 S. Ct. 926), granting petitioners' initial petition for a writ of certiorari, vacating the Appellate Division's prior order and remanding the case to the Appellate

Division for further consideration in light of *Potawatomi*. *Amicus* respectfully submits that, consistent with the prior decisions of this Court, the State of New York, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes, may require tax agents and other wholesalers that sell cigarettes to retail outlets on Indian reservations to comply with regulations which limit the quantity of untaxed cigarettes that can be purchased for resale by reservation retailers to an amount no greater than the maximum legitimate Indian consumption of the reservation on which the retailer is located and which impose upon the non-Indian suppliers only minimal burdens relating to recordkeeping and reporting.

THE REGULATIONS AT ISSUE AS APPLIED TO INDIAN TRADERS ARE VALID AND SHOULD BE UPHELD

This Court has been asked to determine whether New York State may enforce a regulatory scheme designed to aid in the collection of validly imposed State taxes on the sale of cigarettes on Indian reservations to non-Indian purchasers. The Court has made plain in its decisions in *Moe*, *Colville* and *Potawatomi* that States may impose minimal burdens on Indian trade to prevent the avoidance of tax by non-Indian purchasers of goods from retail outlets on Indian reservations. However, the court below decided that the regulations at issue could not be validly applied to the respondents' businesses, relying on its own decision in *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536, 516 N.Y.S.2d 179 (1987), *vacated and remanded*, 487 U.S. 1112, *aff'd on remand*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988), where the court held that the presumptive effect of the Indian trader statutes, 25 U.S.C. § 261 *et seq.* (1988), precluded the State from imposing *any* burden on Indian traders, however minimal.

Amicus believes that these cases were wrongly decided, that the decision below directly contravenes the prior decisions of this Court and that the issues presented raise important questions of federal law to those States in which Indian reservations are located. The consequence of the decision below will be that

legitimate wholesalers will continue to face unfair competition by other wholesalers who evade their tax obligation and be subjected to significant losses in revenue from the sale of untaxed cigarettes to non-Indians on Indian reservations in New York State.

A. Under Federal Law, States May Require Wholesalers Who Sell to Reservation Outlets to Comply with State Tax Regulations Whose Purpose Is to Prevent the Avoidance of Tax by Non-Indian Purchasers of Goods

The Court of Appeals held that the regulations at issue were invalid *per se* simply because Indian traders were regulated, no matter how minimal the burden imposed. However, as this Court plainly decided in *Moe*, *Colville* and *Potawatomi*, States may enforce regulations aimed at the collection of valid taxes on sales by Indians on Indian reservations which impose minimal burdens on Indian businesses, in order to prevent the avoidance of taxes by non-Indian purchasers of goods. If this holding is permitted to stand, New York will be left with no effective means to enforce the collection of its valid taxes on sales to non-Indians on Indian reservations and legitimate agents and wholesalers will be unable to compete with other wholesalers who evade their tax obligations.

In *Moe*, this Court explicitly ruled that states may regulate Indian retailers in order to ensure their compliance with valid state taxes. In that case, the Court found that Montana could require tribal sellers of cigarettes to collect a valid state sales tax imposed upon non-Indian purchasers of cigarettes, finding that a scheme whose purpose was identical to that of New York – the collection of valid state taxes – imposed a constitutionally permissible minimal burden on Indian businesses.

State regulations that require Indian retailers and their suppliers to assist in the collection of valid state taxes do not violate the letter of the Indian trader statutes so long as the regulations are not unreasonably burdensome, and do not violate the

purpose of those statutes which were enacted to protect Indians from unfair advantage. *See, e.g., Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

As this Court found in *Moe*:

> [T]he competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked. (emphasis omitted)

425 U.S. at 482. In New York, the loss of tax revenue from sales to non-Indians on Indian reservations is the "largest single form of evasion . . . ." *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2 (quoting Commissioner James W. Wetzler).

In *Colville*, this Court cited Moe for the principle that "if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." 447 U.S. at 159. Significantly, the Court referred to Indian "businesses" and did not draw arbitrary distinctions based upon a business's place in the chain of distribution, as did the court below.

At issue in *Colville* was a Washington State tax on the sale of cigarettes within the State. As with the New York regulations at issue here, reservation Indians could purchase unstamped cigarettes sold by tribal members, but non-Indians were required to pay the tax. The *Colville* Court reaffirmed *Moe* in holding that a state could impose minimal burdens upon tribal smoke shop operators in order to eliminate the evasion of taxes by non-Indian cigarette purchasers at those shops, despite the fact that

the smoke shop operators were federally licensed Indian traders who came fully within the scope of the Indian trader laws.[2] *See Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978).

The decision of the court below directly conflicts with *Colville*, where this Court extended the holding in *Moe* by holding that a state may enforce its regulations by seizing shipments of unstamped cigarettes sent to the reservation from wholesalers outside the state even though their sales to the Indian retailers were exempt from State taxation and no State tax was due while the cigarettes were in transit. 447 U.S. at 161-62. Although the goods at issue in *Colville* were seized from out-of-state wholesalers off the reservation, the wholesalers clearly were "Indian traders" within the Indian trading laws. Unquestionably, the burden imposed on those wholesalers was no less significant than that rejected by the New York Court of Appeals in this case. This Court in Colville unequivocally held that federal Indian law did not preempt the Washington regulations, stating:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

447 U.S. at 155.

In *Potawatomi*, this Court further solidified the principle that such regulations are permissible. In that case, the Potawatomi tribe sued to enjoin an assessment by the Oklahoma Tax Commission seeking back taxes for cigarette sales over a four-year period at a convenience store owned and operated by the tribe on land held in trust for it by the Federal Government. While

[2] This Court has interpreted the term "Indian trader" to apply to any person introducing goods or trading on an Indian reservation. *Central Machinery*, 448 U.S. at 164-65.

the Court found that the tribe's sovereign immunity prevented the collection of back taxes from a reservation retailer, as it did in *Moe* and *Colville*, it nonetheless concluded that sovereign immunity did not shield the tribe from prospective tax collection burdens. The Court held: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." 498 U.S. at 512. Significantly, this Court explicitly included Indian wholesalers among those to whom the State could look to collect taxes due:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or *by assessing wholesalers who supplied unstamped cigarettes to the tribal stores*. (emphasis added, citations omitted)

498 U.S. at 514.

However, in the decision below, the New York Court of Appeals erroneously concluded that this Court's statement in *Potawatomi* meant that the "remedies" referred to may be employed only *retroactively* to collect unpaid taxes on past sales, and that the State could not require Indian traders to assist in tax collection prospectively. 81 N.Y.2d at 426; 599 N.Y.S.2d at 514. In light of the principal holding of the Court of Appeals, there is no meaningful basis for the distinction made in the decision below. If, as the Court of Appeals concluded, the Indian

trader laws preclude the states from any regulation of trade with Indian traders whatsoever, any form of regulation would be prohibited, regardless of its retroactive or prospective nature.

Thus, it is clear that the holding of the court below in these cases that the Indian trader laws, by their very existence, place every transaction between an Indian retailer and its supplier beyond the regulatory authority of the states, is in direct conflict with federal law as interpreted by this Court. The consequence of the holding is that the State cannot effectively collect its valid taxes, and competitors of reservation suppliers are left with no remedy for the loss of business due to the unlawful sale of untaxed cigarettes to reservation outlets for resale to non-Indian consumers.

B. The Regulations at Issue Providing for the Collection of Taxes on Sales of Cigarettes to Non-Indians Impose Minimal Burdens on Non-Indian Suppliers Permissible Under Federal Law

The principal holding in the court below that, to the extent that this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens on Indian retailers and traders," the regulations at issue are barred by federal preemption because, in the court's view, they impose "significant" burdens on wholesalers (81 N.Y.2d 417, 427, 599 N.Y.S.2d 510, 514), is also plainly erroneous. This Court has never held that state laws which merely impose recordkeeping and reporting requirements on wholesalers selling goods to retail outlets on Indian reservations in order to assist a state in collecting valid taxes place an unacceptable burden on Indian commerce. To the contrary, in *Moe*, *Colville* and *Potawatomi*, this Court upheld the principle that regulations no less "burdensome" than the regulations at issue here may be enforced to assist in the collection of validly imposed taxes.

In its decision below, the New York Court of Appeals relied on its prior ruling in *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536, 544, 516 N.Y.S.2d 179, 184 (1987), *(Herzog I)*, where the court correctly expressed the standard to be applied in evaluating such state regulations:

> [W]hen a State tax is imposed upon, or otherwise burdens, a transaction between a non-Indian customer and an Indian individual or tribe, and the legal incidence of the tax is determined to properly fall on the non-Indian party, the Supreme Court has nonetheless "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" to determine whether the method of collecting the State tax is constitutional (Cohen, Federal Indian Law, at 413, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45).

This Court in *White Mountain*, however, went on to state that the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." 448 U.S. at 145. The New York Court of Appeals has erroneously applied a rigidly mechanical approach to the concept of tribal sovereignty in holding, without significant discussion, that the burden placed upon the wholesaler under the regulations at issue is excessive.

In the cases cited by the Court of Appeals where courts have struck down impermissible burdens on Indian trade, there has always been a direct state imposition on Indian commerce in the form of taxes, licenses, or other similar requirements aimed at or directly affecting Indians themselves. For example, in *White Mountain*, Arizona sought to enforce its motor carrier license tax and use fuel tax on a logging company that operated solely on an Indian reservation. The Supreme Court held that the taxes could not be enforced on "operations that are conducted solely on Bureau [of Indian Affairs] and tribal roads within the reservation." 448 U.S. at 148. The taxes would have taken value away from the reservation since the costs would be passed on to the Indian tribe, which was the beneficiary of the logging contracts. This Court found that the taxes would frustrate the general

federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.' *Id.* at 149 (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

In the cases primarily relied upon in the decision below, *Herzog I* and *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988) *(Herzog II)*, the Court of Appeals struck down New York regulations aimed at the collection of valid state taxes on motor fuel. In those cases, however, Indians actually *paid taxes* and were required to assume the burden of applying for refunds or credits. Thus, the regulatory scheme at issue in the *Herzog* cases arguably violated federal policy by taking value from Indians either for the short term, until the tax was credited, or permanently from those Indians who were unwilling or unable to apply for refunds or credits. In contrast, however, the plan at issue here *never* imposes a tax upon Indian sales to Indian purchasers. For the Court of Appeals to apply the same mechanical approach in rejecting both a plan that taxes sales to Indian consumers and a plan that does not, simply because both plans, to whatever degree, *affect* Indians, plainly goes against the intent of the prior decisions of this Court, impairs the State's ability to collect legitimate taxes, and deprives members of the Association of substantial revenues in the face of unlawful competition.

Finally, this Court should grant the petition for certiorari for two further reasons. First, in the decision below, the Court of Appeals misinterpreted the clear intent of this Court in remanding this case. Twice now, in the instant case and in *Herzog I*, this Court has vacated judgments and remanded decisions for reconsideration in light of regulations that allow the State to collect its valid taxes while not taxing sales by Indians to Indian purchasers. Despite these remands, the Court of Appeals has not altered its view that any burden, however minimal and for whatever valid purpose, is improper. The Court of Appeals clearly has misread the intent of this Court in remanding these cases, and the petition for a writ of certiorari should be granted in order to rectify the error.

Second, the petition should be granted in order to establish the Court's position on this important issue beyond possible dispute. Respondents urged in the court below that this Court's observations in *Potawatomi* that states could ensure the collection of cigarette taxes "by assessing wholesalers who supplied unstamped cigarettes to the tribal stores," 498 U.S. at 514, is mere *obiter dictum* and therefore has no precedential value. Even if this Court's observation in *Potawatomi* is *dictum*, it is well-settled that *dicta* of this Court must be accorded significant weight by lower courts. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 496 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *In re Comac Co.*, 402 F. Supp. 43, 45 (E.D. Mich. 1975). However, it is imperative that this vital issue be resolved in an unambiguous holding, in order to enable states to stem the increasing loss of revenues through misinterpretation of federal law, and to enable legitimate suppliers of reservation retailers to compete on a lawful and equal basis.

Congress never intended for Indians or their off-reservation suppliers to benefit from the windfalls that arise from the protections afforded by the Indian Trader laws. If those statutes are construed to confer inequitable competitive advantages upon the Indian traders to the detriment of competing distributors, including members of the Association, and to facilitate the avoidance of legitimately imposed tax obligations, member distributors located in close proximity to reservations will continue to suffer substantial economic losses and the State will continue to be deprived of much-needed tax revenues.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Dated: New York, New York
October 6, 1993

Respectfully submitted,

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Distributors, Inc.

APPENDIX

APPENDIX

MEMBER LIST

NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC.

Amsterdam Tobacco Co.
Amy-Lynne Corp. d/b/a Bellerose Tobacco
Andy's Tobacco & Candy Wholesale
Auer & Co., Inc.

Bonanza Trading Associates
Boro Park Tobacco Company
Borough Hall-Oxford Tobacco Corp.
Brighton Tobacco & Candy Co.
Bronx Beer
Buffalo Tobacco Products

C.G. Marousis Company, Inc.
Center Candy Corp.
City Line Candy

Day Wholesale, Inc.
Derigo Sales, Inc.
Donohue and Higgins Candy & Tobacco Company
Duane Reade Corp.

E.P. Kirst & Sons, Inc.
Elmira Tobacco Company, Inc.
Empire Candy & Tobacco Co.

F & T Distributing Co, Inc.
Finkle Distributors, Inc.
Frank Colucci Inc.

Globe Wholesale Co.
Gray's Wholesale, Inc.
Gutlove and Shirvint, Inc.

H.P. Brewster Company d/b/a Button Bros., Inc.
Harold Levinson Associates
Harry J. Fourtunis, Inc.
Herkimer Wholesale Co., Inc.

I. Rothschild, Inc.
Irving Ness Co.

J.A. Calderon & Company, Inc.
J.J. Maloney Company, Inc.
Jack Gordon Tobacco Co., Inc.
Jacob Kern & Sons, Inc.
Jones-McIntosh Tobacco Co.
Joslen Wholesale Co., Inc.

Keystone Candy & Tobacco Co.
Kingston Candy & Tobacco Co.
The Kroger Company, Inc.

Lavin Candy Co., Inc.

Mandel Tobacco Company, Inc.
Mauro Pennisi Inc.
Milhelm Attea & Bros., Inc.
Miller Automatic, Inc.
Morris Brown, Inc.
Mountain Candy & Cigar Co., Inc.
d/b/a Mountain/Service Distributors
Mutual Candy Company
Mutual Wholesale Services Inc.

NCC
Newcastle Tobacco & Candy, Inc.
North Country Candy and Tobacco Inc.

Queens Tobacco and Candy Company, Inc.

Richmond Wholesale Co., Inc.
The Rowe Corporation

S & L East
Sanders Langsam Tobacco Co., Inc.
Scheidelman, Inc.
Sheal Inc.
Sho-Sho Bros., Inc.
South Beach Novelties & Confectionery Co., Inc.
Stan-Lou Tobacco Inc.
Standard-Rosenbaum, Inc.
Sunrise Candy & Tobacco Co.

T & R Tobacco Sales Company
Tzetzo Bros., Inc.

United Candy & Tobacco Co., Inc.

W.E. Brown & Company, Inc.
Westchester Candy Supply

MOTION FILED
OCT -6 1993

No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

On behalf of: Seneca Nation of Indians; Mohawk Tribal Council; Iroquois Business Association; Honor Indian Treaties; Seneca Coalition Against Taxes

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JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

IN THE

Supreme Court of the United States

October Term, 1993

No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

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Pursuant to Rule 37.4 of the Supreme Court Rules, the Seneca Nation of Indians by this Motion seeks permission to file one *amicus curiae* brief in opposition to the petition for certiorari in this case. The respondent is a federally licensed Indian Trader who trades with Seneca Nation of Indian retailers. The moving *amici* parties are the Seneca Nation of Indians, the Mohawk Tribal Council, the Honor Indian Treaties Committee, Iroquois Business Association, and the Seneca Coalition Against Taxes.

These parties appeared in the Court below as *amici curiae* and attempted to obtain the consent of the parties to appear before this Court as provided for in Rule 37.2. The attorneys for the respondents, Milhelm Attea and Brothers and Elias H. Attea, Jr., Inc., both have consented. However, the attorney on behalf of the petitioners, Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner, has refused to consent.

Specifically, Mr. Millenbach, who appeared on behalf of the petitioner in the New York Court of Appeals, advised that the State would consent to the filing of an *amicus* brief, **but only if that brief did not discuss the Seneca and Six Nations treaties or New York statutes that prohibit taxation within the reservations of New York.**

This Motion is being made so that the Court can have all the relevant law before it, which is the function of an *amicus* brief, as specified in Rule 37.1. When this case was argued before the New York State Court of Appeals, that court granted an order permitting the moving parties herein to file one *amicus* brief on behalf of the *amici* parties.

After receiving the *amici* brief in this matter and at the request of the *amici* parties, the New York Court of Appeals also granted the unusual relief of permitting oral argument by the *amici* parties.

It is respectfully submitted that the petitioner's attempt to determine what is relevant or to limit what arguments are made by the Seneca Nation of Indians should be rejected, as it would deprive this Court of the opportunity to review the same points of law and material that were presented to the court below.

Pursuant to Rule 37.4, the moving parties herein submit that they have a more overriding interest in the outcome of this case than either of the parties. The Seneca Nation of Indians, a federally recognized Indian tribe, is one of the Six Nations, [also known as the Iroquois Confederacy] and as such possesses Sovereign rights under the earliest treaties ever negotiated by the United States government, guaranteeing peaceful enjoyment of their land, free of disturbances. Additionally and most significantly, the Senecas were guaranteed freedom from State and local taxes on their reservations in The 1842 Compromise Treaty with the Senecas at the Buffalo Creek Reservation.

Because its treaty rights were negotiated at such an early date in our Nation's history, the Seneca Nation enjoys a unique historical posture which differentiates them from other tribes. Unlike the western tribes, which were defeated in battle, relinquished their claim of ownership, and were often relocated, the Seneca Nation of Indians was never defeated, nor ever relocated. The New York State Senate in 1857 describe the Seneca's title to their lands as "absolute, original and exclusive".

The unique posture of the Seneca Nation of Indians unlike that of the tribes discussed in the cases [Moe, Colville, Potawatomi] relied on by the petitioner, has resulted in a rich body of New York State law reflecting and recognizing the unique, sovereign status of the Seneca Nation. These state laws include a New York statute prohibiting the petitioner from applying any of its tax laws within the reservation. The actions of the

petitioner threaten to destroy the security from state interference that the Senecas have enjoyed since New York adopted a law in 1857, prohibiting tax collection on the Seneca reservations.

Additionally, the State of New York expressly asked Congress repeatedly for a grant of general authority to apply its civil laws on New York reservations. These requests have been repeatedly denied, and although criminal jurisdiction was granted in 1948, Congress expressly proclaimed in 1950 that the State of New York lacked power to apply its tax laws within the reservations. Again, the petitioner's actions threaten these well settled rights of the Senecas, which they have achieved and maintained for over 200 years.

More importantly, in the only New York Indian case ever before this Court involving the question of taxation, this Court, over 100 years ago, held that the treaties prohibit New York State from attempting to apply any of its tax laws on the reservations. This court wrote that it examined the treaty language and could come to only one conclusion—that the Nation does not hold title to its land through the United States but holds it in its original claim of ownership, and that the State of New York, therefore, may not impose any of its laws, including its tax laws within the reservation.

Only Congress, which was granted exclusive plenary power to deal with Indian affairs, has the power to alter this result and Congress has expressly spoken to the subject and affirmatively denied New York taxing power within the confines of the Nation's property.

It is respectfully submitted that the arguments raised herein are significant and dispositive of the issues in this case. The New York Court of Appeals felt these arguments were significant enough to warrant granting *amicus curiae* relief, and indeed felt these arguments were so significant as to grant the unusual relief of permitting oral argument to the *amici* parties.

The Court's attention is further directed to a subsequent case commenced by the petitioner Department of Taxation which is currently pending in the New York State courts. *Snyder v. Wetzler*, Index No. 946-92. The *Snyder* case was, in the petitioner's own words, a "test case" and directly at issue in that case is the power of the State of New York to impose its taxing regulations within the Seneca Nation lands. The moving parties herein have also appeared in that case as *amici curiae*.

Finally, in support of this motion, the Court's attention is drawn to Rule 37.5, which provides that consent to the filing of an *amicus curiae* brief is not necessary when the brief is submitted on behalf of an agency of the United States, a state, territory, commonwealth, or political subdivision. Although Rule 37.5 does not expressly refer to an Indian Nation, there is substantial precedent in federal law for not only recognizing the sovereign status of the Indian Nations but also regarding them for many purposes as equivalent to a state.

In this matter the Seneca Nation of Indians has an overwhelming interest in the outcome of this litigation, as the integrity of the Nation's treaties, federal statutes applicable only to tribes in New York as well as the economic survival of the Nation itself are all at stake.

Because the Seneca Nation has such an overriding interest in the outcome of this case and is uniquely able to bring relevant matters to the court's attention, permission to file the attached *amici curiae* brief is respectfully requested of the Court.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

On behalf of: Seneca Nation of Indians; Mohawk Tribal Council; Iroquois Business Association; Honor Indian Treaties; Seneca Coalition Against Taxes

QUESTION PRESENTED

Is the State of New York Department of Taxation preempted by Treaty, Federal, or State Laws from applying State Tax regulations taxing the conduct of commerce on a Seneca Reservation?

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STATEMENT OF INTEREST

The Seneca Nation of Indians is a federally recognized sovereign Indian Nation. It is one of the Six Nations (Seneca, Mohawk, Onondaga, Oneida, Cayuga, Tuscarora), also known as the Iroquois Confederacy. The Senecas enjoy a unique position in early American Indian history. Unlike many Western Tribes who were defeated in battle and surrendered their claim of ownership to the United States and who were often forced to relocate, the Senecas were never conquered or forced to surrender. The Seneca Nation never relocated from their aboriginal lands. Treaties acknowledge the Sovereignty of the Seneca Nation and their right to the free use and enjoyment of their land, not to be disturbed by the United States or New York State. For example, the 1789 Treaty at Fort Harmar provides that the U.S. "relinquishes" all claim to the Seneca's land "and each and every part thereof". The Senecas 1842 Compromise Treaty contains an express covenant that the taxing power of New York will never be imposed on their reservations "for any purpose".

If the New York Tax Commissioner's position prevailed, the Seneca Nation Members and the other *amici* parties would suffer irreparable harm. Heretofore their treaties, federal and state statutes have protected them from such injury. The Seneca Nation and the Mohawk tribe possess Sovereign rights which New York is attempting to obliterate without any congressional authority.

The tax regulations in the instant case represent an attempt by the State of New York to circumvent the express promises made by the United States and the State of New York in these treaties to the Senecas. This *Amici* Brief is submitted to call to the Court's attention the Federal and State statutes and decisional law, including Supreme Court cases, that developed as a result of the sacred promises made by the United States and the State of New York to the Senecas.

SUMMARY OF ARGUMENT

In 1784, the fledgling United States Government elected to buy its peace with the Six Nations of the Iroquois Confederacy.[1]

The foremost author on Indian Affairs, Felix Cohen, devoted an entire chapter of his Treatise to the unique status of the "New York Indians". Felix Cohen, Handbook of Federal Indian Law, Chapter V, (Univ. of N. Mex. Press, 1972). Unlike tribes that were defeated in battle and relocated, the Six Nation Indians were never defeated, the Senecas were not relocated and their title is "original, absolute and exclusive" and does not derive from the United States, nor New York State. See New York Senate Doc. No. 28 (1857).

The unique status of the Seneca Nation was recognized by New York's own State Legislature, which has prohibited taxation of the reservations since 1857. 1857 N.Y. Laws Ch. 45, §4; New York Indian Law, §6 (McKinney 1950).

Congress as well, which has the exclusive power under the Constitution to regulate Indian affairs, has recognized the Six Nations as unique. Despite repeated requests, Congress has refused to delegate to New York the power to apply its civil laws on the reservations, see 25 U.S.C. §§232 & 233, and has refused to make the reservations in New York subject to allotment. Dawes Act, 24 Stat. 388 (1887).

[1] The Treaties between the parties are set forth in an appendix to this Brief and include the following: Fort Stanwix Treaty, Oct. 22, 1784, U.S.—Six Nations, 7 Stat. 15; Fort Harmar Treaty, Jan. 9, 1789, U.S.—Six Nations, 7 Stat. 38; Canandaigua Treaty of Peace, Nov. 11, 1794, U.S.—Six Nations, 7 Stat. 44; Buffalo Creek Compromise Treaty, May 20, 1842, U.S.—N.Y.—Mass.—Seneca Nation.

Most importantly, in the only New York Indian tax case to reach the United States Supreme Court, this Court expressly held that the treaties with the Seneca Nation allow only one interpretation—namely that the treaties prohibit the State of New York from attempting to apply any of its laws, including tax laws, within the reservation. The *New York Indians*, 72 U.S. 761 (1866).

This Court has consistently and repeatedly held that State intrusions onto Indian property must be measured against the specific treaties and statutes that govern the parties. *McClanahan v. Arizona State Tax Commission*, 411 US 164 (1973). This preemption analysis has recently been reaffirmed in *Oklahoma Tax Commission v. Sac and Fox Nation*, No. 92-259 (S.Ct., May 17, 1993).

Despite two hundred years of history, which includes treaties, a State law, an Act of Congress, and a decision from this Court, all prohibiting taxation on the reservation, the New York Tax Commissioner on his own motion has forged ahead without any federal or state legislative authority and elected to apply a tax on a commercial reservation transaction. This was done even though the New York State Legislature in 1992 and 1993 refused to pass a bill that would have authorized the Commissioner's unilateral conduct. New York Senate Bill S7988B.

In light of these overwhelming facts, it is clear that the New York State Court of Appeals correctly found the conduct of this state agency preempted by federal law, and the application for a writ of certiorari should be denied.

ARGUMENT

The Writ Of Certiorari Should Be Denied Because The Court Of Appeals' Decision Is Consistent With The Federal Treaties And Statutes Governing New York.

The petitioner's sole argument for granting certiorari in this case is that the holding of the New York Court of Appeals is in conflict with this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Commission v. Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991) (hereinafter *Moe, Colville, and Potawatomi*). As set forth in the Respondent's brief this proposition is untenable.[2]

Irrespective, however, of what *Moe, Colville & Potawatomi* imply or declare concerning the specific treaties and statutes at issue in those cases, New York is preempted from imposing its taxing or regulatory authority on the transactions at issue under specific treaties, federal statutes, state statutes, and an 1866 decision of this Court—*The New York Indians*, 72 U.S. 761—all uniquely applicable to New York and New York Indians. These relevant sources of State and Federal law make it abundantly clear that New York has no power or authority to regulate these transactions on the reservations. Thus, independently of the Indian Trader

[2] The New York Court of Appeals put this point beyond doubt by finding that the tax scheme imposed "significant" as opposed to "minimal" burdens on the wholesalers and imposed a tax directly on the retailers.

State Court characterizations of state law are accepted as binding by this court. *Knights of Pythias v. Meyer*, 265 U.S. 30, 32 (1924). Stern, Gressman, and Shapiro, Supreme Court Practice, 185 (6th ed. 1986). Cf. *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

As stated by this Court: "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443 (1940).

statutes or cases from other jurisdictions, the Court of Appeals correctly found petitioner's regulations preempted. Consequently, certiorari should be denied.

The preemption doctrine is one of the oldest and most fundamental doctrines of this Court. In 1803 this Court held, in *Marbury v. Madison*, 5 U.S. 137 (1803), that any law that conflicts with the "Supreme Law of the Land" is null and void.

The United States Constitution provides that all treaties made by the United States shall be "the supreme Law of the Land"—the "Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. State action in violation of the Treaties is null and void. See *Fellows v. Denniston*, 23 N.Y. 420, 427 (1861). As noted by Professor Tribe, in his treatise:

> "Under the supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control." Lawrence Tribe, American Constitutional Law [2d ed] p. 226.

Professor Tribe cites as authority several cases, including New York's very own "The New York Indians" (72 U.S. 761).[3]

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) this Court applied the preemption doctrine to Indian Law issues. This Court articulated that State intrusions on Indian Sovereignty must be measured by examining the language of the "applicable treaties and statutes which define the limits of State power",

[3] Professor Tribe also points out that treaties are equal in force with congressional acts. Accordingly, where a congressional act and a treaty have conflicting provisions, the one later in time prevails (Tribe, *Id.*, at pg. 226).

This rule is consistent with and buttresses a corollary principle: that only Congress has the power to regulate Indian affairs and only Congress can delegate power to the states, which are powerless to act in the absence of congressional authorization.

McClanahan, at 172; *Oklahoma Tax Commission v. Sac & Fox Nation*, No. 92-259 (S.Ct., May 17, 1993); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1986); see also *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) ["the dominant trend of our cases is toward treating the scope of reservation immunity from non-discriminatory taxation as a question of preemption"].

Moreover, in applying the *McClanahan* analysis, this Court has mandated that the language of Indian treaties and statutes applicable to Indians must be construed according to the following rules:

> [1] **Ambiguous expressions must be resolved in favor of the Indian parties.** *McClanahan v. State Tax Commissioner*, 411 U.S. 164, 174 (1973); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1912); *Winters v. U.S.*, 207 U.S. 564, 576-77 (1908).
>
> [2] **Language must be interpreted as the Indians would have understood them.** *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Jones v. Meehan*, 175 U.S. 1 (1895); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832);
>
> [3] **Language must be liberally construed in favor of the Indians.** *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Tulee v. Washington*, 315 U.S. 681, 685-85 (1942).
>
> [4] **"[T]ax exemptions secured to the Indians by agreement between them and the national government are to be liberally construed in favor of the Indians."** *Carpenter v. Shaw*, 280 U.S. 363, 367.

In accordance with *McClanahan* and the above cited cases, the preemption issue in the present case can only be resolved by examining the relevant treaties and statutes applicable to the parties in this case.

A. The tax regulations are invalid because they violate the letter and spirit of specific and unique Seneca Nation Treaties, which are the Supreme Law of the Land.

The treaties governing the Senecas and the Six Nations Indians, which are set forth in full in the *Amicus'* Appendix, prohibit the State of New York from applying its laws, particularly its tax laws, on Reservations. As stated by the pre-eminent authority on American Indian law, Felix Cohen, in a special chapter of his treatise devoted solely to the "New York Indians":

> "These several treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and **had the effect of placing the tribes and their Reservations beyond the operation and effect of general state laws.**"

Felix Cohen, Handbook of Federal Indian Law, pp. 418-419 (Univ. of N. Mex. Press, 1972), (emphasis added). The treaties referred to by Professor Cohen include the following:

FORT STANWIX TREATY (1784), 7 Stat. 15

This very first treaty entered into between the Six Nations and the United States illustrates that the parties regarded each other as sovereigns who were both claiming a right to possess the same land. In this first treaty the parties agreed to divide up the lands and thereafter live in peace.

Article III fixes the boundary line between the two parties and provides that "the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary and then they shall be secured in the peaceful possession of the lands they inhabit east and north of same. . . ."

FORT HARMAR TREATY (1789), 7 Stat. 38.

Five years later the parties executed a second treaty, which further defined boundaries and provided that "the said boundary line" shall "remain as a division line

between the lands of the said Six Nations and the territory of the United States, **forever**". The United States agreed to "relinquish" all claims to the Indians' land "and every part thereof".

CANANDAIGUA TREATY OF PEACE (1794), 7 Stat. 44.

This treaty between the United States and the Six Nations, held at Canandaigua, Nov. 11, 1794, recites that it is made for the purpose of removing from the Six Nations' mind "all causes of complaint and establishing a firm and **permanent** friendship". The United States acknowledges the boundaries of the lands belonging to the members of the Six Nations. In Article III the United States expressly promised:

> "Now the United States acknowledge all the lands within the aforementioned boundaries to be the property of the Seneca Nation; **and the United States will never claim the same, nor disturb the Senecas in the free use and enjoyment thereof;** ***but it shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase.***" 7 Stat. 44, Article III.

1842 COMPROMISE TREATY WITH THE SENECA NATION BUFFALO CREEK RESERVATION, 7 Stat. 586.

In addition, and most importantly, there is the Buffalo Creek Compromise Treaty of 1842 to which the State of New York, Massachusetts, the United States and the Seneca Nation were parties. Explicit language in this treaty prohibits New York State from taxing Seneca Nation Indian Reservation activities:

> **"Art. 9. The parties to this compact mutually agree to solicit the influence of the United States to protect such of the lands of the Senecas within the State of New York as may from time to time remain in their possession from all taxes, and assessments for roads, highways and other purposes until such lands shall be sold and conveyed by said Indians and possession thereof shall be relinquished by them." 7 Stat. 586.**

This treaty was later codified by the New York Legislature and revised to provide that no taxes would be imposed on any reservations within the state. See New York Indian Law §6 (McKinney, 1950).

The treaties applicable to the New York Indians are markedly different from the treaties applicable to the western tribes. The petitioner relies heavily on cases which are based on treaties governing only the western tribes. The chief difference is that the western tribes, who were all defeated in battle, were forced to relinquish title to their lands. In exchange they were allowed the "use" of land owned by the United States, often requiring the tribes to relocate.

Moe Treaties

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), for example, the treaty with the Flatheads provided "The Flathead Nation hereby **cede, relinquish and convey** to the U.S. all their right, title and interest in the country occupied and claimed by them within the described boundaries. . . ." Treaty with the Flatheads, July 16, 1855, U.S.—Flathead Nation, 12 Stat. 975. The treaty went on to provide that the tract of the land "above ceded" would be reserved for the "use and occupation" of the tribe. Treaty with the Flatheads, July 16, 1855, U.S.—Flathead Nation, 12 Stat. 975.

This treaty gave the Flatheads vastly limited rights compared to what the Senecas enjoy. Noticeably absent from the Flathead Treaty is the specific language found in the Seneca Treaty of 1789, where the U.S. agreed to "confirm the said boundary line" of the earlier treaty "to the end that it may be and remain **as a division line** between the lands of the said Six Nations and the

territory of the U.S., **forever**" Fort Harmar Treaty, 7 Stat. 38 (emphasis added). The *Moe* treaty did not contemplate any similar jurisdictional division between the Flatheads and the United States.

To the contrary, the Flathead Treaty placed the reservation land under the ownership of the U.S. and made it **subject to allotment at the discretion of the President**. Treaty with the Flatheads, 12 Stat. 975. The Senecas were never made subject to the Allotment Act of 1887, a reflection of their unique status. Also, significantly absent from the *Moe* treaty is any language similar to the promises made in the 1794 Treaty with the Senecas, wherein the "U.S. acknowledged that all land within the reservation boundaries was the **property** of the Seneca Nation" and promised that the "United States will never claim the same **nor disturb the Seneca Nation in the free use and enjoyment thereof**". Treaty at Canandaigua, 7 Stat. 44. The Flathead Treaty does not contain any such explicit agreement prohibiting future interference or disturbance in the use of their own tribally held property.

Finally, perhaps the most significant difference is the obvious absence from the Flathead treaty of any language prohibiting state taxation on or within their reservation. In the Flathead treaty there is no language or provision similar to Article 9 of the 1842 Seneca Treaty in which the United States and the State of New York promised "to protect such lands from all taxes and assessments". Buffalo Creek Treaty, 7 Stat. 586.

Colville Treaties

The Treaties at issue in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, and specifically referred to by the Court, are the following: (1) Treaty of Point Elliot, Jan. 22, 1855, U.S.—Dwámish and Suquámish Indians, 12 Stat. 939; (2) Treaty with the Makah Tribe, Jan. 31, 1855,

U.S.—Makah, 12 Stat. 939; (3) Treaty with the Yakamas, June 9, 1855, U.S.—Yakama Nation, 12 Stat. 951.

These treaties are quite similar to the Flathead Treaty in *Moe*. The Treaties with the Dwámish Indians and the Yakamas both generally provide that these tribes cede their claims of ownership to the United States and that specified tracts of land are reserved "for the use and occupation" of the tribes.

The treaty with the Makah tribe similarly provides "that a tract of land is reserved **for the present use and occupation**" of the tribe. The Makah Treaty also made the tribe subject to **involuntary removal** from such reservation at anytime. Treaty with the Makah Tribe, 12 Stat. 939 (1855) (emphasis added).

All three of the Treaties with the Dwámish, Makah, and Yakamas made the reserved land subject to Allotment at the "discretion" of the President. Treaty at Point Elliot, 12 Stat. 939 (1855). Significantly, once again the treaties cited in *Colville* contain no specific provision prohibiting "any taxes or assessments" on such reservations, as does the 1842 Treaty with the Seneca Nation. 7 Stat. 586. Such preemptive language is noticeably absent from all treaties relied on in *Colville*.

The Seneca treaties recognize the Senecas as a sovereign Nation with a perpetual right to the undisturbed use and enjoyment of the land within their borders. The Senecas are not subject to removal, allotment, or taxation as are the western tribes in the cases relied on by the petitioner. To the contrary, the United States expressly agreed to "relinquish" all claims to the Seneca's land "and every part thereof." Fort Harmar Treaty, 7 Stat. 38. The legal position of the Seneca Nation is completely opposite from the Colville tribes, and thus under *McClanahan*, *Colville* does not provide precedent by which to fairly assess the law governing transactions on the Seneca Reservations.

Potawatomi Treaties

The Potawatomi have even less autonomy than the Colville and Flathead tribes. The District Court in the *Potawatomi* opinion (W.D. Oklahoma, F.D.C., CIV-87-0338-W) describes the tragic history of the tribe's removal from the Great Lakes to Kansas and then to Oklahoma. The court also related their allotment and receipt of new land conveyed to them by the federal government. Notably, the land at issue in *Potawatomi* was conveyed to the Citizen Band by virtue of legislation and a quit claim deed, both expressly providing that "these tracts were **not exempt from taxation** or restriction on use, management or disposition because of Indian ownership." See *Oklahoma Tax Comm. v. Potawatomi, supra;* see also *State of Oklahoma, County of Pottowautomie,* Book 281, Quitclaim Deeds, p. 28.

As in *Moe* and *Colville,* treaties with the Potawatomis are significantly different from the relevant treaties made with the Seneca Nation. Treaty with the Pottowautomie Nation, June 5 & 17, 1846, U.S.—Pottowautomies, 9 Stat. 853 (1846); Treaty with the Pottawatomies, Nov. 15, 1861, U.S.—Pottawatomie tribe, 12 Stat. 1191; Treaty with the Pottawatomie Indians, Feb. 27, 1967, U.S.—Pottawatomie Tribe, 15 Stat. 531. The Senecas never relinquished title to their land. They were never relocated like the Potawatomis. Their title to the Cattaraugus and Allegheny reservations is ***"original" "absolute"*** and ***"exclusive".*** New York Sen. Doc. 28, 1857. As noted above, the Senecas are not subject to allotment. However, the most direct contrast between the two situations is that the Potawatomi lands were specifically declared by Congress as "not exempt from taxation". 74 Stat. 903; 78 Stat. 392, whereas the 1842 Treaty with the Senecas declared their reservation land free "from all taxes and assessments". This tax exempt language is also found in 25 U.S.C. 233 ("Provided further, that nothing in this section shall be construed as subjecting the lands within

Indian Reservation in the State of New York to Taxation for state or local purposes.") and New York Indian Law, §6 ("no taxation for any purpose whatsoever.").

B. The New York Legislature recognized the unique effect of the Seneca Treaties by declaring the reservations wholly exempt from taxation in Indian Law Section 6.

In the 1842 Buffalo Creek Compromise Treaty with the Senecas, the United States and the State of New York, who were both parties, expressly promised in Article 9 to protect the lands of the Senecas "from all taxes" until such lands are conveyed by the Senecas and possession relinquished by them.

In 1841 New York attempted to apply its tax laws within the Seneca Nation reservations. In light of the 1842 Seneca Treaty, a New York State Senate Committee in 1857 reviewed the treaties and concluded as follows:

> **"From a careful examination of the several treaties heretofore made with the Senecas . . . your committee are clearly of the opinion, that the Senecas do not hold the title to the Cattaraugus and Allegheny reservations under the State of New York, nor under the United States, but their title to same is original, absolute and exclusive" New York Senate Doc. No. 28 (1857) (Emphasis added).**

The New York Senate Judiciary Report adopted by the Senate went on to conclude that the State of New York, as a party to the treaty, "is also bound not to impose taxes on said reservations" *Id.*

Based on the Senate Judiciary Report, the New York State Legislature enacted in 1857 a state law expressly prohibiting taxes:

> **"No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, for any purposes whatever, so long as said reservations remain the property of the Seneca**

> **Nation; and all acts of the legislature of this state conflicting with the provisions of this section, are hereby repealed." 1857 New York Laws Ch. 45, §4.**

Since that time the State of New York Legislature has continually reaffirmed the public policy of tax exemption on Indian reservations. In 1892, this status was codified as part of the state's general Laws in Chapter V, Article I, Sec. 6 incorporating the same text as the 1857 statute. In 1907, the statute was revised and became part of the Consolidated Laws in Chapter 5, Article 2, Sec. 6. The language of the statute was broadened to generally exempt **all reservations** in New York from state taxation, in addition to the Seneca reservations. The new Sec. 6 was entitled **Exemption of reservation lands from taxation** and stated:

> **"No taxes shall be assessed for <u>any purpose whatever,</u> upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same". 1909 New York Laws, Ch. 31, Article 2.**

Today, that provision is known as Indian Law Sec. 6 and thus this statute **presently acknowledges** and confirms that the "Treaties made with the Senecas have the effect of precluding any state taxation, **"for any purpose whatever"**, on the Indian reservations within the State of New York. New York Senate Doc. 28 (1857).

C. The uniqueness of the Seneca Treaties was conclusively established by the United States Supreme Court in 1866 in the *New York Indians* case, which held that New York may not apply its laws within Seneca borders for any purpose.

Shortly after the New York Senate had performed its own analysis of the treaties and the State Legislature had adopted what is now Indian Law §6, banning all State taxes within the reservation, the issue was raised in the United States Supreme Court. In *The New York Indians,* 72 U.S. 761, this Court declared invalid the 1841 statute which authorized the construction of roads

and bridges on the reservations and which also provided for tax assessments to pay for them. Even though the statute barred the State from entering the reservation for the purpose of collecting the tax, this Court invalidated the law and declared the reservations wholly exempt from not only state taxation but also from State action building roads within Reservation borders.

This Court examined the treaties and came to the same conclusion as did the New York Senate four years earlier—that the State of New York has no power whatsoever over the Reservations.

> "[T]he rights of the Indians do not depend on this or any other statutes of the State but upon treaties which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them. . . .
>
> "These treaties are historical . . . beginning in 1784 and coming down to 1842. That of 1794, entered into at Canandaigua, New York, may be cited as a specimen. Third Article, 'The United States acknowledge all the land within the aforementioned boundaries . . . to be the property of the Seneca Nation, and the United States **will never claim the same nor disturb the Seneca Nation, . . . in the free use and enjoyment thereof**; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase. . . .
>
> "These are the guarantees given by the United States, and which her faith is pledged to uphold. Now we have seen that this law, [the 1841 NY Statute] taxing the lands in the reservations, authorizes the county authorities to enter upon them, survey and lay out roads, construct and repair them, construct and repair bridges, assess and collect taxes to meet the expenses, and survey the lands for the purpose of making the assessments,

and in pursuance of these powers the proper officers of the counties have assessed upon them large sums for the years 1840, 1841, 1842, and 1843.

"The answer to all this interference with the possession and occupation, and exercise of authority is, that the sale of the lands in default of payment of the taxes shall not "affect the right of occupancy of the Indians." We are of opinion that this is not a satisfactory answer.

"We have looked through all the treaties from 1784 down to the present time. . . .

"Until the Indians have sold their lands, . . . they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them.

"**We must say . . . these reservations [are] wholly exempt from State taxation, . . . and the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations**" *The New York Indians,* **72 U.S. at 766-771 (emphasis added).**

What is important to note about this holding of the Supreme Court invalidating the 1841 statute, is that it was based on the Treaty language of 1794, 7 Stat. 44, which recognized the "ancient possession" of the Indians of New York and guaranteed their "undisturbed enjoyment". Such language, held this Court, not only rendered the reservations "wholly exempt from State taxation" but prohibited the state from entering for the purpose of constructing roads and bridges. Indeed, *The New York Indians* case was later described by this Court as one "where the State sought to raise money by taxes to build roads in Indian Reservations and where existing treaties forbade the State's building such roads" *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 602 (1943).

The point is that what the treaties forbade, **and forbid,** is the interference with the possessory right of the Indians to use the reservation land as they see fit. Building roads without approval on the reservations interfered with this possessory right; taxing the land to finance this construction interfered with such possessory right; and what the Department of Taxation and Finance has done here interferes with the basic possessory right of the Seneca to conduct trade without the interference and intrusion of the State of New York.

D. Congress reaffirmed the unique effect of the Seneca Treaties when, in enacting 25 U.S.C. §233, it refused to grant New York the power to extend its civil laws to the reservations and further expressly prohibited state taxation on such reservations.

The United States Constitution grants to Congress the exclusive, plenary power to regulate Indian affairs (United States Constitution, Art. I, §8, cl.3). The founding fathers recognized the need to protect the tribes from encroachment by state governments. This philosophy is reflected in the Indian Trader statutes, which, in accord with the United States Constitution, have completely preempted the field and prohibit state governments from encroaching into reservation matters. *Warren Trading Post Co. v. Arizona Tax Comm.,* 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona Tax Comm.,* 448 U.S. 160 (1980). Only Congress, therefore, can regulate trade occurring on the reservations. Absent an express delegation of power from Congress, the state may not regulate reservation affairs. *Montana v. Blackfeet,* 171 U.S. 759, 765 (1985), *County of Yakima v. Yakima Nation,* _____ U.S. _____, 112 S. Ct. 683 (1992).

Congress did delegate in 1948 to New York State the power to apply its criminal laws on the reservations (25 U.S.C. 232). Congress was asked, and expressly refused, however, to allow New York to apply its civil laws on the reservations.

This fact was admitted by Tax Commissioner Wetzler, one of the petitioners herein, in a statement made last year to the New York State Senate Committee, which was considering a bill that would make New York's tax laws applicable to the reservations. Commissioner Wetzler candidly admitted:

> "Despite the fact that New York once sought a specific Congressional delegation of general civil authority over Indians and Indian reservations, Congress has not given New York such authority. New York's general civil laws—including its tax laws—are not, therefore, automatically applicable to tribe members on reservations."[4]

This statement of New York's Tax Commissioner succinctly summarizes the attempts by New York to extend its civil control over the reservations. Throughout much of the early 1900's, efforts were made by leaders in New York to assimilate the New York Indians and abolish their Sovereign status. Legislative documents in New York, such as the Whipple Report illustrate the thinking at that time, which was "that the best that could be done for the Indian would be 'exterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty'" Lawrence Hauptman, Formulating American Indian Policy in New York State, 1970-1986, quoting the Whipple Report, New York State Assembly Document No. 51 (1888).

[4] The footnote to the statement provided: "The purported grant of civil jurisdiction contained in 25 USC 233 is virtually identical to that of another federal statute (28 USC 1360), which the U.S. Supreme Court ruled in Bryan v. Itasca County, (426 U.S. 313 (1976)) was not a general grant of authority over Indians and reservations, but only opened up state courts to tribe members."

In furtherance of this plan, Congress was asked to pass a law that would divide in severalty the lands of the Six Nations. HR 18735, 63rd Cong. 3d Sess. (1915). A House document on that bill noted a second attempt was a constitutional amendment at the state level which would have extended state laws to the reservations. Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal—State Relations*, Buff. L. Rev., 1, 13 (Fall 1958). Along those same lines, in 1930 the Snell Bill was introduced into Congress. This bill would have authorized what the petitioner herein now seeks—State law would generally have applied throughout the reservation. HR 9720, 71st Congress 2nd Sess. 1930. Like earlier attempts to grant New York State civil authority over the Reservations, the Snell Bill was rejected by Congress.

Instead, in response to a Second Circuit case holding that New York Courts had no jurisdiction to hear civil cases involving Indians, *United States v. Forness*, 125 F. 2d 928 (2d Cir. 1942), Congress in 1950 enacted 25 U.S.C. §233 (1989). Section 233 did not provide that New York's civil laws would apply on the reservations but provided only that New York Courts could be used as a forum for civil disputes involving Indians. For clarity, Congress added a provision in §233 that **"nothing in this section shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or Local purposes"** 25 U.S.C. §233 (1989) (Emphasis added).

Under the Constitution New York is powerless to interfere with Indian matters unless Congress so authorizes. Congress has expressly refused to delegate to petitioner the authority they have usurped.

CONCLUSION

Under *McClanahan*, 411 U.S. 164, and its progeny, the issue of preemption must be governed by the specific treaties and federal statutes applicable to the parties. In the case of the Seneca Nation and other New York Indians, the treaties themselves expressly provide that the reservations shall be free from State laws and particularly State tax laws.

The unilateral action of the New York State Department of Taxation contradicts the laws of New York's own State Legislature and violates 200 years of history, including treaties as well as an Act of Congress (25 U.S.C. §233) and a decision from this Court (The New York Indians), both of which examined the applicable treaties and found that they prohibit applying state tax laws within the reservations.

For all these reasons the New York State Court of Appeals correctly found the petitioner's regulations preempted, and the petition for certiorari should be denied.

Respectfully submitted,

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AMICI CURIAE APPENDIX

TREATY WITH THE SIX NATIONS, 1784

Oct. 22, 1784

7 Stat., 15

Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States, in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive them into their protection upon the following conditions:

ARTICLE I.

Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

ARTICLE II.

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

ARTICLE III.

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing Place, upon the lake

named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-path, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffalo Creek on Lake Erie; thence south to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

ARTICLE IV.

The Commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above articles, will order goods to be delivered to the said Six Nation for their use and comfort.

Oliver Wolcott, [L.S.]
Richard Butler, [L.S.]
Arthur Lee, [L.S.]

Mohawks:

Onogwendahonji, his x mark, [L.S.]
Touighnatogon, his x mark, [L.S.]

Onondagas:

Oheadarighton, his mark, [L.S.]
Kendarindgon, his x mark, [L.S.]

Senekas:

Tayagonendagighl, his x mark, [L.S.]
Tehonwaeaghrigagi, his x mark, [L.S.]

Oneidas:

Otyadonenghti, his x mark, [L.S.]
Dagaheari, his x mark, [L.S.]

Cayuga:

Oraghgoanendagen, his x mark, [L.S.]

Tuscaroras:

Ononghsawenghti, his x mark [L.S.]
Tharondawagon, his x mark, [L.S.]

Seneka Abeal:

Kayenthoghke, his x mark, [L.S.]

Witnesses:

Sam. Jo. Atlee,
Wm. Maclay,
Fras. Johnston,
Pennsylvania Commissioners.
Aaron Hill
Alexander Campbell,
Saml. Kirkland, missionary,
James Dean,
Saml. Montgomery,
Derick Lane, captain,
John Mercer, lieutenant,
William Pennington, lieutenant,
Mahlon Hord, ensign,
Hugh Peebles.

TREATY WITH THE SIX NATIONS, 1789

Jan. 9, 1789

7 Stat., 38

Articles of a treaty made at Fort Harmar, the ninth day of January, in the year of our Lord one thousand seven hundred and eighty-nine, between Arthur St. Clair, esquire, governor of the territory of the United States of America, north-west of the river Ohio, and commissioner plenipotentiary of the said United States, for removing all causes of controversy, regulating trade, and settling boundaries, between the Indian nations in the northern department and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part:

Art. 1. WHEREAS the United States, in congress assembled, did by their commissioners, Oliver Wolcott, Richard Butler, and Arthur Lee, esquires, duly appointed for that purpose, at a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas, and Senekas, at fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, give peace to the said nations, and receive them into their friendship and protection; And whereas the said nations have now agreed to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the before mentioned treaty at fort Stanwix; and whereas it was then and there agreed, between the United States of America and the said Six Nations, that a boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, vix: Beginning at the mouth of a creek, about four miles east of Niagara, called

Ononwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of ;the carrying place, between lake Erie and lake Ontario, to the mouth of Tehoseroton, or Buffalo creek, upon lake Erie; then south, to the northern boundary of the state of Pennsylvania; thence west, to ;the end of the said north boundary; thence south, along the west boundary of the said state to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of ;the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego, for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby renew and confirm the said boundary line in the words before mentioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever. And the undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the considerations before mentioned, do release, quit claim, relinquish, and cede, to ;the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait, from the mouth of Ononwayea and Buffalo

Creek, for them, the said United States of America, to have and to hold the same, in true and absolute propriety, forever.

ART. 2. The United States of American confirm to the Six Nations, all the lands which they inhabit, lying east and north of the before mentioned boundary line, and relinquish and quit claim to the same and every part thereof, excepting only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents.

ART. 3. The Oneida and Tuscarora nations are also again secured and confirmed in the possession of their respective lands.

ART. 4. The United States of America renew and confirm the peace and friendship entered into with the Six Nations, (except the Mohawks), at the treaty before mentioned, held at fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included.

Done at Fort Harmar, on the Muskingum, the day and year first above written.

In witness whereof, the parties have hereunto, interchangeable, set their hands and seals.

Ar. St. Clair, [L.S.]
Cageaga, or Dogs Round the Fire, [L.S.]
Sawedowa, or The Blast, [L.S.]
Kiondushowa, or Swimming Fish, [L.S.]
Oncahye, or Dancing Feather, [L.S.]
Sohaeas, or Falling Mountain, [L.S.]
Otachsaka, or Broken Tomahawk, his x mark, [L.S.]

Tekahias, or Long Tree, his x mark [L.S.]
Onecnsette, or Loaded Man, his x mark, [L.S.]
x mark, [L.S.]
Kiahtulaho, or Snake, [L.S.]
Aqueis, or Bandy Legs, [L.S.]
Kiandogewa, or Big Tree, his x mark, [L.S.]

Owenewa, or Thrown in the Water, his x mark, [L.S.]
Gyantwaia, or Cornplanter, his x mark, [L.S.]
Gyasota, or Big Cross, his x mark, [L.S.]
Kannawsee, or New Arrow, [L.S.]
Achiout, or Half Town, [L.S.]
Anachout, or The Wasp, his x mark [L.S.]
Chishekoa, or Wood Bug, his x mark, [L.S.]
Sessewa, or Big Bale of a Kettle, [L.S.]
Sclahowa, or Council Keeper, [L.S.]
Tweanias, or Broken Twig, [L.S.]
Sonachghowa, or Full Moon, [L.S.]
Cachunwasse, or Twenty Canoes, [L.S.]
Hickonquash, or Tearing Asunder, [L.S.]

In presence of-

Jos. Harmar, lieutenant-colonel commanding First U.S. Regiment and brigadier-general by brevet,
Richard Butler,
Jno. Gibson,
Will. McCurdy, captain,
Ed. Denny, ensign First U.S. Regiment,
A. Hartshorn, ensign,
Robt. Thompson, ensign, First U.S. Regiment,

TREATY WITH THE SIX NATIONS, 1794

Nov. 11, 1794

7 Stat., 44, Proclamation,
Jan. 21, 1795

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free

use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's Creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the

Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same consideration, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792;[1] making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of ;the Six Nations, and their Indian friends aforesaid.

ARTICLE VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for

[1] It appears that this treaty was never ratified by the Senate. See American State Papers, Indian Affairs, vol. 1, p. 232. Also, post 1027.

injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering, [L.S.]
Onoyeahnee, his x mark, [L.S.]
Konneatorteeooh, his x mark, or Handsome Lake, [L.S.]
Tokenhyouhau, his x mark, alias Captain Key. [L.S.]
Oneshauee, his x mark, [L.S.]
Hendrick Aupaumut, [L.S.]
David Neesoonhuk, his x mark, [L.S.]
Kanatsoyh, alias Nicholas Kusik, [L.S.]
Tauhoondos, his x mark, or Open the Way, [L.S.]
Twaukewasha, his x mark, [L.S.]
Sequidongquee, his x mark, alias Little Beard, [L.S.]
Kodjeote, his x mark, or Half Town, [L.S.]
Kenjauaugus, his x mark, or Stinking Fish, [L.S.]
Soonohquaukau, his x mark, [L.S.]

Sohhonteoquent, his x mark, [L.S.]
Ooduhtsait, his x mark, [L.S.]
Konoohqung, his x mark, [L.S.]
Tossonggaulolus, his x mark, [L.S.]
John Skenendoa, his x mark, [L.S.]
Oneatorleeooh, his x mark, [L.S.]
Kussauwatau, his x mark, [L.S.]
Eyootenyootauook, his x mard, [L.S.]
Kohnyeaugong, his x mard, alias Jake Stroud, [L.S.]
Shaguiesa, his x mark, [L.S.]
Teeroos, his x mark, alias Captain Prantup, [L.S.]
Sooshaoowau, his x mark, [L.S.]
Henry Young Brant, his x mark, [L.S.]
Sonhyoowauna, his x mark, or Big Sky, [L.S.]
Onaahhah, his x mark, [L.S.]
Hotoshahenh, his x mark, [L.S.]
Kaukondanaiya, his x mark, [L.S.]
Nondiyauka, his x mark, [L.S.]
Kossishtowau, his x mark, [L.S.]
Oojaugenta, his x mark, or Fish Carrier, [L.S.]
Toheonggo, his x mark, [L.S.]
Ootaguasso, his x mark, [L.S.]
Joonondauwaonch, his x mark, [L.S.]
Kiyauhaonh, his x mark, [L.S.]
Ootaujeaugenh, his x mark, or Broken Axe, [L.S.]
Twenniyana, his x mark, [L.S.]
Jishkaaga, his x mark, or Green Grasshopper, alias Little Billy, [L.S.]
Tuggehshotta, his x mark, [L.S.]
Tehongyagauna, his x mark, [L.S.]
Tehongyoowush, his x mark, [L.S.]
Konneyoowesot, his x mark, [L.S.]
Tioohquottakauna, his x mark, or Woods on Fire, [L.S.]
Taoundaudeesh, is x mark, [L.S.]
Honayawus, his x mark, alias Farmer's Brother, [L.S.]
Soggooyawauthau, his x mark, alias Red Jacket, [L.S.]
Konyootiayoo, his x mark, [L.S.]
Sauhtakaongyees, his x mard, or Two Skies of a length, [L.S.]
Ounnashattakau, his x mark, [L.S.]
Kaungyanehquee, his x mark, [L.S.]
Sooayoowau, his x mark, [L.S.]
Kaujeagaonh, his x mark, or Heap of Dogs, [L.S.]
Soonoohshoowau, his x mark, [L.S.]
Thaoowaunias, his x mark, [L.S.]
Soonongjoowau, his x mark, [L.S.]
Kiantwhauka, his x mark, alias Cornplanter, [L.S.]
Kiantwhauka, his x mark, [L.S.]

Witnesses:

Israel Chapin.
Willian Shepard, jr.
James Smedley.
John Wickham.
Augustus Porter.
James K. Garnsey.
William Ewing.
Israel Chapin, jr.
Horatio Jones,
Joseph Smith,
Jasper Parish,
Intrpreters.
Henry Abeele.

TREATY WITH THE SENECAS

May 20, 1842

7 Stat., 586, Proclamation,
Aug. 26, 1842

Articles of a treaty made and concluded at Buffalo Creek, in the State of New York, on the twentieth day of May in the year one thousand eight hundred and forty-two, between the United States of America, acting herein by Ambrose Spencer their Commissioner, thereto duly authorized, on the one part, and the chiefs, headmen and warriors of the Seneca nation of Indians, duly assembled in council, on the other part.

Whereas a treaty was heretofore concluded, and made between the said United States, and the chiefs, headmen, and warriors of the several tribes of New York Indians, dated the fifteenth day of January in the year one thousand eight hundred and thirty-eight, which treaty having been afterwards amended, was proclaimed by the President of the United States, on the fourth of April one thousand eight hundred and forty, to have been duly ratified.

And whereas on the day of making this treaty, and bearing even date herewith, a certain indenture was made executed and concluded by and between the said Seneca nation of Indians and Thomas L. Ogden, and Joseph Fellows, assignees under the State of Massachusetts, in the presence, and with the approbation of a Commissioner appointed by the United States, and in the presence and with the approbation of Samuel Hoare, a superintendent on the part of the commonwealth of Massachusetts, which indenture is in the words and figures following to wit:

"THIS INDENTURE made and concluded between Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario of the one part, and the chiefs and headmen of the Seneca nation of Indians, on the other part at a council duly assembled and held at Buffalo Creek in the State of New York on the twentieth day of May in the year one thousand eight hundred and forty-two in the presence of Samuel Hoare, the superintendent thereto authorized and appointed by and on the part of the commonwealth of Massachusetts, and of Ambrose Spencer a Commissioner thereto duly appointed and authorized on the part of the United States.

"Whereas at a council held at Buffalo Creek on the fifteenth day of indenture of that date was made and executed by and between the parties to this agreement, whereby the chiefs and headmen of the Seneca nation of Indians for the consideration of two hundred and two thousand dollars did grant, bargain, release and confirm unto the said Thomas Ludlow Ogden and Joseph Follows, all those four several tracts of land, situate within the State of New York, then and yet occupied by the said nation, or the people thereof, severally described in eh said indenture, as the Buffalo Creek Reservation, containing by estimation forty-nine thousand nine hundred and twenty acres of land, the Cattaraugus Reservation containing by estimation twenty-one thousand six hundred and eighty acres of land, the Allegany Reservation, containing by estimation thirty thousand four hundred and sixty-nine acres of land, and eight hundred acres of land; a duplicate of which indenture was annexed to a treaty of the same date made between the United States of America and the chiefs, headmen, and warriors of the several tribes of New York Indians assembled in council; which treaty was amended

and proclaimed by the President of the United States on the fourth of April one thousand eight hundred and forty, as having been duly ratified; as by the said indenture, treaty and proclamation more fully appear.

"And whereas divers questions and differences having arisen between the chiefs and headmen of the Seneca nation of Indians or some of them, and the said Thomas Ludlow Ogden and Joseph Fellows in relation to the said indenture, and the rights of the parties thereto, and the provisions contained in the said indenture being still unexecuted, the said parties have mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions hereinafter specified.

"NOW THEREFORE IT IS HEREBY MUTUALLY DECLARED, AND AGREED, BY AND BETWEEN THE SAID PARTIES AS FOLLOWS.

"ARTICLE FIRST. The said Thomas Ludlow Ogden, and Joseph Fellows in consideration of the release and agreements hereinafter contained, on the part of the said Seneca nation do on their part consent covenant and agree that they the said nation (the said indenture notwithstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre-emption, and all other the right and title which they then had or held in or to the said tracts of land.

"ARTICLE SECOND. The chiefs and headmen of the Seneca nation of Indians in consideration of the foregoing, and of the agreement next hereinafter contained, do on their part grant, release and confirm unto the said Thomas Ludlow Ogden, and Joseph Fellows, and the their heirs and assigns, in joint tenancy, the whole of the said two tracts of land severally called the Buffalo Creek Reservation, and the Tonnewanda Reservation, and all the right and interest therein of the said nation.

"ARTICLE THIRD. It is mutually agreed, between the parties hereto that in lieu of the sum expressed in the said indenture, as the consideration of the sale, and release of the said four tracts of land, there shall be paid to the said nation a just consideration sum, for the release of the two tracts, hereby confirmed to the said Ogden and Fellows, to be estimated and ascertained as follows.

"The present value of the Indian title to the whole of the said four tracts of land including the improvements thereon, shall for all the purposes of this present compact, be deemed and taken to be two hundred and two thousand dollars, of which sum one hundred thousand dollars shall be deemed to be the value of such title in and to all the lands within the said four tracts exclusive of the improvements thereon, and one hundred and two thousand dollars to be the value of all the improvements within the said four tracts, and of the said sum of one hundred thousand dollars the said Ogden and Fellows shall pay to the Seneca nation such proportion as the value of all the lands within the said two tracts called the Buffalo Creek, and Tonnewanda Reservations shall bear to the value of all the lands within all the said four tracts—and of the said sum of one hundred and two

thousand dollars, the said Ogden and Fellows shall pay such proportion as the value of the improvements on the same two tracts, shall bear to the value of the improvements on all the said four tracts.

"ARTICLE FOURTH. The amount of the consideration monies to be paid in pursuance of the last preceding article, shall be determined by the judgment and award of arbitrators, one of whom shall be named by the Secretary of the War Department of the United States, and one by the said Ogden and Fellows, which arbitrators in order to such judgment and award, and to the performance of the other duties hereby imposed on them, may employ suitable surveyors to explore examine and report on the value of the said lands and improvements, and also to ascertain the contents of each of the said four tracts, which contents shall govern the arbitrators as to quantity in determining the amount of the said consideration money.

"The same arbitrators shall also award and determine the amount to be paid to each individual Indian out of the sum which on the principles above stated, they shall ascertain and award to be the proportionate value of the improvements on the said two tracts called the Buffalo Creek Reservation and the Tonnewanda Reservation, and in case the said arbitrators shall disagree as to any of the matters hereby submitted to them, they may choose an umpire whose decision thereon shall be final and conclusive, and the said arbitrators shall make a report in writing of their proceedings in duplicate, such reports to be acknowledged or proved according to the laws of the State of New York, in order to their being recorded, one of such reports to be filed in the office of the Secretary of the Department of War, and the other thereof to be delivered to the said Thomas L. Ogden and Joseph Fellows.

"ARTICLE FIFTH. It is agreed, that the possession of the two parts hereby confirmed, to the said Ogden and Fellows, shall be surrendered and delivered up to them, as follows, viz: The forest or unimproved lands on the said tracts, within one month after the report of the said arbitrators shall be filed, in the office of the Department of War, and the improved lands within two years after the said report shall have been so filed: Provided always that the amount to be so ascertained and awarded, as the proportionate value of the said improvements shall on the surrender thereof be paid to the President of the United States, to be distributed among the owners of the said improvements according to the determination and award of the said arbitrators, in this behalf, and provided further that the consideration for the release and conveyance of the said lands shall at the time of the surrender thereof be paid or secured to the satisfaction of the said Secretary of the War Department, the income of which is to be paid to the said Seneca Indians annually.

"But any Indian having improvements may surrender the same, and the land occupied by him and his family at any time prior to the expiration of the said two years, upon the amount awarded to him for such improvements being paid to the President of the United States, or any agent designated by him for that purpose by the said Ogden and Fellows, which amount shall be paid over to the Indian entitled to the same, under the direction of the War Department.

"ARTICLE SIXTH. It is hereby agreed and declared to be the understanding and intent of the parties hereto, that such of the said Seneca nation, as shall remove from the State of New York, under the provisions of any treaty, made or to be made, between the United States

and the said Indians, shall be entitled in proportion to their relative numbers to the funds of the Seneca nation, and that the interest and income of such their share and proportion of the said funds, including the consideration money to be paid to the said nation in pursuance of this Indenture, and of all annuities belonging to the said Nation shall be paid to the said Indians so removing at their new homes, and whenever the said tracts called the Allegheny and the Cattaraugus Reservations, or any part thereof shall be sold and conveyed by the Indians remaining in the State of New York, the Indians so removing shall be entitled to share in the proceeds of said sales in the like proportion. And it is further agreed and declared, that such Indians owning improvements in the Cattaraugus and Alleghany tracts as may so remove from the State of New York, shall be entitled on such removal, and on surrendering their improvements to the Seneca nation, for the benefit of the nation to receive the like compensation for the same, according to their relative values, as in the third and fourth articles of this treaty are stipulated to be paid, to the owners of improvements in the Buffalo Creek and Tonnewanda Tracts, on surrendering their improvements; which compensations may be advanced by the President of the United States, out of any funds in the hands of the Government of the United States, belonging to the Seneca nation, and the value of these improvements shall be ascertained and reported by the Arbitrators, to be appointed in pursuance of the fourth article.

"ARTICLE SEVENTH. This Indenture is to be deemed to be in lieu of, and as a substitute for the above recited Indenture made and dated the fifteenth day of January, one thousand eight hundred and thirty eight, so far as the provisions of the two instruments may be inconsistent, or contradictory, and the said Indenture so

far as the same may be inconsistent with the provisions of this compact, is to be regarded and is hereby declared to be rescinded and released.

"ARTICLE EIGHT. All the expenses attending the execution of this Indenture and compact including those of the arbitration and surveys hereinbefore referred to, and also those of holding the treaty now in negotiation between the United States and the said Seneca Nation, except so far as may be provided for by the United States, shall be advanced and paid by the said Ogden and Fellows.

ARTICLE NINTH. The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

"IN WITNESS WHEREOF, the parties to these presents have hereunto, and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca Nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written."

THEREFORE taking into consideration the premises it is agreed and stipulated by and between the United States of America and the Seneca nation of Indians, as follows, to wit:

First, The United States of America consent to the several articles and stipulations contained in the last recited Indenture between the said nation, and the said Thomas Ludlow Ogden and Joseph Fellows, above set forth.

Second, The United States further consent and agree that any number of the said nation, who shall remove from the State of New York, under the provisions of the above mentioned Treaty proclaimed as aforesaid, on the fourth day of April one thousand eight hundred and forty, shall be entitled in proportion to their relative numbers to all the benefits of the said Treaty.

Third, The United States of America further consent and agree, that the tenth article of said Treaty proclaimed as aforesaid on the fourth day of April one thousand eight hundred and forty, be deemed, and considered as modified, in conformity with the provisions of the Indenture hereinabove set forth, so far as that the United States will receive and pay the sum stipulated to be paid as the consideration money of the improvements therein specified, and will receive hold and apply the sum to be paid, or the securities to be given for the lands therein mentioned, as provided for in such Indenture.

In testimony whereof the undersigned Ambrose Spencer Commissioner on the part of the United States of America, and the undersigned chiefs and headmen of the Seneca nation of Indians, have to two parts of this treaty, one thereof to remain with the United States, and the other thereof with the Seneca nation of Indians, set their hands and affixed their seals the day and year first above mentioned.

Ambrose Spencer.

Tit-ho-yah, or William Jones
Saul Lagure,
Gau-geh-gruh-doh, or George Jimison,
N.T.Strong,
Hau-neh-hoys-soh, or Blue Eyes,
Jabez Stevenson,
William Krouse,
Samuel Wilson, or Ni-ge-jos-a,
William Krouse,
Thompson S. Harris,
Sah-go-en-toh, or Morris Halftown,
Ten-wan-ne-us, or Governor Black Snake,
Doa-ne-pho-gah, or Little Johnson,
Joh-nesh-ha-dih, or James Stevenson,
Ho-wah-tan-eh-goh, or John Pierce,
Da-gon-de, or William Patterson,
Daniel Fau Guns,
Goat-hau-oh, or Billy Shanks,
Daniel Fau Guns,
Goat-hau-oh, or Billy Shanks,
James Pierce,
Gi-eut-twa=geh, or Robert Watt,
Seneca White,
Gesh-u-aw, or James Shongo,
Jarvis Spraing,
Ti-at-tah-co, or Aman Dextador,
Moris B. Pierce,
So-gooh-quas, or John Tallchief.
Isaac Halftown,
Samuel Goudon,
Tunis Halftown,
Hau-sa-nea-nes, or White Seneca,
Gah-nang-ga-eot, or Young Chief,
Thomas Jimeson,
Moses Stevenson,
Johah Armstrong,
Joseph Silverheels,
Da-o-as-sah-au, or Jo. Hunlock,
George Fox,
Yaw-sau-ge, or Peter Johnson,
Noh-sok-dah, or Jim Jonas,
Dih-no-se-du, or Jacob Shongo,
John Seneca, or Jo-on-da-goh,
Ho-no-yea-os, or Jacob Bennett,
George Turkey,
David Snow,
John Bark
George Killbuck
George Dennis,
John Kennedy, sen.,
Abram John,
Job Pierce,
Saw-da-ne, or George Deer,
Ga-na-waw, or John Cook,
Jaw-ne-es, or John Dickey,
George Big Deer,
Nah-joh-gau-eh, or Tall Peter,
John Kennedy, jr.

Signed sealed and delivered in the presence of—.

A. Dixon, Commissioner on the part of New York.
Benj. Ferris,
Orlando Allen,
Asher Wright,
O. H. Marshall,
Elam R. Jewett,
Cortland B. Stebbins,
Joseph S. Wasson.

(To the Indian names are subjoined a mark and seal.)

No. 93-377

(6)

Supreme Court, U.S.
FILED
DEC 9 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

BEST AVAILABLE COPY

JOINT APPENDIX

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Petition for Certiorari Filed September 7, 1993
Certiorari Granted November 1, 1993

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Notation as to items not printed in Joint Appendix

The following opinions, decisions, judgments and orders have been omitted in the printing of this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

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Dec. 30, 1988	Summons (Index No. 7-89 Supreme Court, Albany County
Dec. 30, 1988	Verified Complaint (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Order to Show Cause (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Affidavit of Rosemary Saffire in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Summons (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Verified Complaint (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Order to Show Cause (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Affidavit of Elias H. Attea, Jr. in support of plaintiff's motion for a preliminary injunction (Index No. 8-89) Supreme Court, Albany County

Jan. 9, 1989	Affidavit of Richard J. Freshour in opposition to plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of Frank Munoz in opposition to plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of Richard J. Freshour in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of Frank Munoz in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89)
Jan. 9, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89)
Jan. 14, 1989	Affidavit of Joseph E. Zdarsky in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County

Jan. 14, 1989	Affidavit of Joseph Anderson in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 17, 1989	Oral argument on motions for preliminary injunction (Index Nos. 7-89; 8-89) Supreme Court, Albany County
Jan. 18, 1989	Decision of Supreme Court, Albany County (Cheeseman, J) granting plaintiffs' motions for preliminary injunction (Index Nos. 7-89; 8-89)
Jan. 19, 1989	Order of Supreme Court, Albany County (Cheeseman, J) granting plaintiffs' motions for preliminary injunction (Index Nos. 7-89; 8-89)
Jan. 20, 1989	Verified Answer (Index No. 7-89) Supreme Court, Albany County
Jan. 20, 1989	Verified Answer (Index No. 8-89) Supreme Court, Albany County
April 3, 1989	Plaintiff's Notice of Motion for Summary Judgment (Index No. 7-89) Supreme Court, Albany County
April 3, 1989	Affidavit of Rosemary Saffire in support of plaintiff's motion for summary judgment (Index No. 7-89) Supreme Court, Albany County

April 24, 1989	Plaintiff's notice of motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
April 24, 1989	Affidavit of Elias H. Attea, Jr. in support of plaintiff's motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 26, 1989	Defendants' Notice of Cross-Motion for Summary Judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Affadavit of Jamie Woodward in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for summary judgment and in support of defendants' motion for summary judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Defendants' Notice of Cross-Motion for Summary Judgment (Index No. 8-89) Supreme Court, Albany County

May 26, 1989	Affidavit of Jamie Woodward in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 26, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 30, 1989	Affidavit of Joseph E. Zdarsky in support of plaintiff's motion for summary judgment and in reply to defendants' papers (Index No. 7-89) Supreme Court, Albany County
May 30, 1989	Affidavit of Timothy M. O'Mara in support of plaintiff's motion for summary judgment and in reply to defendants' papers (Index No. 8-89) Supreme Court, Albany County
May 30, 1989	Oral argument on plaintiffs' motions for summary judgment and defendants' cross-motions for summary judgment (Index Nos. 7-89; 8-89) Supreme Court, Albany County

June 5, 1989	Decision of Supreme Court, Albany County (Cheeseman, J.) granting summary judgment to plaintiffs (Index Nos. 7-89; 8-89)
Aug. 22, 1989	Order and Judgment of Supreme Court, Albany County (Cheeseman, J.) granting plaintiffs declaratory and permanent injunctive relief (Index Nos. 7-89; 8-89)
Sept. 21, 1989	Defendants' Notice of Appeal to the Appellate Division, Third Department (Index No. 7-89) Supreme Court, Albany County
Sept. 21, 1989	Defendants' Notice of Appeal to the Appellate Division, Third Department (Index No. 8-89) Supreme Court, Albany County
Oct. 16, 1990	Oral argument before the Appellate Division, Third Department (Index Nos. 7-89; 8-89)
Dec. 6, 1990	Original decision of Appellate Division, Third Department (Index Nos. 7-89; 8-89)
Jan. 8, 1991	Original order of Appellate Division, Third Department (Index No. 7-89; 8-89)

March 8, 1991	Defendants' Notice of Appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) Supreme Court, Albany County
May 9, 1991	Order of New York Court of Appeals dismissing defendants' appeal taken as of right (Index Nos. 7-89; 8-89)
July 2, 1991	Defendants' motion for leave to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
July 19, 1991	Affidavit of Joseph E. Zdarsky in opposition to defendant's motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
July 19, 1991	Affidavit of Timothy M. O'Mara in opposition to defendants' motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
Sept. 12, 1991	Order of New York Court of Appeals denying defendants' motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89)

Nov. 26, 1991	Petition for writ of certiorari for defendants (Docket No. 91-907) United States Supreme Court
Dec. 26, 1991	Respondents' Brief in opposition (Docket No. 91-907) United States Supreme Court
Jan. 21, 1992	Order of United States Supreme Court granting petitioners' petition for a writ of certiorari and vacating the judgment of the Appellate Division, Third Department, and remanding the case for further consideration (Docket No. 91-907)
June 2, 1992	Oral argument on remand before the Appellate Division, Third Department (Index Nos. 7-89; 8-89)
July 9, 1992	Opinion and order of Appellate Division, Third Department on remand (Index Nos. 7-89; 8-89)
July 14, 1992	Plaintiff's Notice of Appeal to New York Court of Appeals (Index No. 7-89) Supreme Court, Albany County
July 14, 1992	Plaintiff's Notice of Appeal to New York Court of Appeals (Index No. 8-89) Supreme Court, Albany County

April 28, 1993	Oral argument before New York Court of Appeals (Index Nos. 7-89; 8-89)
June 10, 1993	Opinion of New York Court of Appeals (Index Nos. 7-89; 8-89)
June 10, 1993	Order of New York Court of Appeals (Index Nos. 7-89; 8-89)
Sept. 7, 1993	Petition for writ of certiorari for defendants (Docket No. 93-377) United States Supreme Court
Nov. 1, 1993	Order of United States Supreme Court granting petitioners' petition for a writ of certiorari

Summons (Index No. 7-89).

STATE OF NEW YORK

SUPREME COURT
COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants

Index No. 7-89

To the above named Defendant(s):

YOU ARE HEREBY SUMMONED AND REQUIRED to serve upon the Plaintiff's attorney, at the address stated below, a written Answer to the attached Complaint.

If this Summons is served upon you within the State of New York by personal service you must respond within twenty (20) days after service, not counting the day of service. If this Summons is not personally delivered to you within the State of New York you must respond within

THIRTY (30) days after service is completed, as provided by law.

If you do not respond to the attached Complaint within the applicable time limitation stated above a Judgment will be entered against you, by default, for the relief demanded in the Complaint, without further notice to you.

This action is brought in the County of Defendant's residence because of: Designation made by Plaintiff.

Dated: December 20, 1988

KAVINOKY & COOK
Attorney(s) for Plaintiff(s)
Office, Post Office Address and
Telephone
120 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 845-6000

Verified Complaint (Index No. 7-89).

STATE OF NEW YORK

SUPREME COURT
COUNTY OF ALBANY
[Same Title]

Plaintiff by its attorneys Kavinoky & Cook for its complaint herein alleges as follows:

1. At all times hereinafter mentioned, plaintiff Milhelm Attea & Bros., Inc. a/k/a Milhelm Attea & Brothers, Inc. a/k/a Milhem Attea Brothers, Inc. (hereinafter referred to as "Attea"), was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business in the State of New York at the address specified above.

2. Upon information and belief, defendant James W. Wetzler is the Commissioner of Taxation and Finance of the State of New York, and the head of defendant Department of Taxation and Finance of the State of New York (the "Department of Taxation and Finance").

3. Upon information and belief, defendant James W. Wetzler, as the Commissioner of Taxation and Finance is responsible, pursuant to §170 and §171 of the Tax Law of the State of New York, for the administration of the Tax Laws of the State of New York.

4. Upon information and belief, defendant Tax Appeals Tribunal of the State of New York (the "Tax Appeals Tribu-

nal") is a body consisting of three commissioners responsible for the administration of the division of tax appeals pursuant to Article 40 of the New York Tax Law.

5. At all times hereinafter mentioned, plaintiff was and still is a wholesale dealer of cigarettes licensed under New York Tax Law §480, and was and still is engaged in, among other things, the wholesale distribution and sale of cigarettes in New York, and was and still is an agent appointed by the New York State Tax Commission to purchase and affix cigarette tax stamps pursuant to New York Tax Law §471.

6. At all times pertinent, plaintiff Attea was and still is distributing and making wholesale sales of cigarettes to Indians on Indian reservations located within the territorial boundaries of the State of New York, which Indian reservations include, but are not limited to, the Allegany Indian reservation, the Cattaraugus Indian reservation, the Tuscarora Indian Reservation, the Onondaga Indian Reservation and the Saint Regis Indian Reservation, which reservations are sovereign territories of sovereign American Indian Tribes.

7. Pursuant to New York Tax Law §471, a tax is imposed on all cigarettes possessed in the state by any person for sale, subject to certain exceptions, including the exception that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax. . . ."

8. The State of New York does not have the power to impose or levy cigarette taxes pursuant to Article 20 of the

New York Tax Law with respect to the aforesaid sales of cigarettes by plaintiff to Indians on Indian reservation nor does the State of New York have the power to regulate such business transactions conducted on Indian reservations, because, *inter alia*, pursuant to the United States Constitution, Article 1, section 8, clause 3, Congress has the sole power to regulate commerce with the Indian Tribes and the laws of the United States enacted pursuant thereto, in particular, the Indian trader statutes, 25 U.S.C. §§261 *et seq.*, and regulations enacted thereunder which govern trade with Indians on Indian reservations, have pre-empted such state taxes, laws and regulations.

9. In addition, Indians on Indian reservations are immune from state taxation unless such state taxation is specifically authorized by the Congress of the United States.

10. The defendants have long recognized the tax immunity of Indians on Indian reservations, and the pre-emptive effect of federal law with respect to wholesale sales of cigarettes by plaintiff Attea to such Indians, since, for several years, the defendants have accepted and approved, after audit, plaintiff Attea's monthly Resident Agent Cigarette Tax Returns, form CG-6, which reflect such wholesale sales of Schedule D to such returns, entitled "Sales and Transfers of Unstamped Cigarettes within the State," for which no New York cigarette taxes were collected or charged.

11. Notwithstanding the foregoing, and on or about August 29, 1987, defendant James W. Wetzler as Commissioner of Taxation and Finance and as the head of defendant Department of Taxation and Finance of the State of New York adopted certain regulations which purport to apply New York's Tax Law to plaintiff's sales of cigarettes to

Indians on Indian reservations and require the collection of New York cigarette taxes with respect to such sales as well as comprehensively regulate such sales. A copy of such regulations (hereinafter referred to as the "New Regulations") is annexed hereto as Exhibit "A."

12. The New Regulations, by their very terms, became effective on November 30, 1988; provided, however, that from such date of effectiveness to and including December 31, 1988, the New York Regulations provide for a grace period when the defendants will register Indian Tribes and "registered dealers" as that term is defined in the New Regulations.

13. By reason of the foregoing, the New Regulations are in full force and effect and by their terms, purport to apply to transactions occurring on and after January 1, 1989. *See*, New Regulations, pages 17-18.

14. Pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, except as to certain limited quantities approved by the defendant Department of Taxation and Finance or in some circumstances as agreed between defendant Department of Taxation and Finance and the Indian Tribe, subject to the other terms and limitations of such New Regulations. *See*, New Regulations pages 11-15, §§335.5(e); 335.5(b)(3), *et. seq.*

15. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New

York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, unless such cigarettes are sold to certain Indians on such reservations who fulfill comprehensive requirements of defendant Department of Taxation and Finance, including registration with said defendant as a "Registered Dealer", subject to the other terms and limitations of such New Regulations. *See*, New Regulations, pages 7-8, 11-12, §§335.4(e), 335.5(b).

16. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian Tribes or nations in New York unless such Tribes or nations themselves obtain a valid exempt organization certificate issued by defendant Department of Taxation and Finance, and otherwise comply with the terms and limitations of such New Regulations. *See*, New Regulations, pages 5-6, §335.4(c).

17. Pursuant to the New Regulations, defendants also seek to impose upon wholesale distributors such as plaintiff Attea certain additional and special record keeping requirements with respect to sales to Indians on Indian reservations, including but not limited to receiving and retaining exemption certificates from Indian purchasers of untaxed cigarettes sold by plaintiff pursuant to the regulations, copies of invoices or other written evidence of such sales signed by the Indian purchasers taking delivery of such cigarettes, records of the Tribe's exempt organization number or the Registered Dealer's registration number, and other documents, all subject to the terms and limitations of

such New Regulations. *See,* New Regulations, pages 6-7, §335.4(a).

18. Because Article 20 of the Tax Law, and in particular, Tax Law §471 thereof, expressly provides that "no tax shall be imposed on cigarettes sold under circumstances that this state is without power to impose such tax . . .," the aforesaid statute which imposes such cigarette taxes, by its own terms, does not apply to the sale and delivery of cigarettes made by plaintiff to Indians on Indian reservations as set forth above and, by reason of the foregoing, the New Regulations adopted by the defendants cannot be enforced with respect to sales made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York.

19. In addition to the foregoing, to the extent that Article 20 of the New York Tax Law may be applied by defendants to plaintiff's transactions with Indians on Indian reservations, and to the extent that any of the provisions of Article 20 of the New York Tax Law do not, by their terms, expressly provide that same are not applicable to sales of the cigarettes made when "sold under such circumstances that this state is without power to impose such tax . . .," said provisions are unconstitutional on their face or insofar as same are applied or may be applied pursuant to the New Regulations or otherwise to the sales of cigarettes made by plaintiff to Indians on Indian reservations and, by reason of the foregoing, said provisions and such application are preempted by federal law.

20. In addition to the foregoing, Indians on Indian reservations are immune from such State taxation and cannot be compelled, pursuant to the New Regulations or otherwise, to

pay cigarette taxes to the plaintiff with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations.

21. Plaintiff's Indian customers are desirous of making wholesale purchases of cigarettes from the plaintiff but have refused to pay States taxes to the plaintiff with respect to such purchases and have otherwise refused to be regulated by the defendant Department of Taxation and Finance with respect to such purchases.

22. By reason of the foregoing, there is presented for consideration and determination in this action the question of the power and jurisdiction of the defendants to impose cigarette taxes upon plaintiff's wholesale sales of cigarettes to Indians on Indian reservations, and the question of the power and jurisdiction of the defendants to otherwise regulate such transactions.

23. A declaratory judgment with respect to the issue herein involved will settle directly, expeditiously and with finality the aforesaid controversy.

24. Plaintiff will suffer irreparable damage and is without an adequate remedy at law and is therefore entitled to a declaratory judgment of its rights regarding the application and legal effect of New York's Tax Law upon plaintiff in connection with the subject of this action, and is entitled to a preliminary and permanent injunction against the defendants in connection therewith, because of the foregoing reasons and for the following additional reasons:

(a) Plaintiff will unnecessarily be subjected to various administrative proceedings before defendant New York Tax Appeals Tribunal in order to contest any determinations hereinafter made by the defendants with respect to sales made by plaintiff to Indians or Indian reservations subsequent to the effective date of the New Regulations, which administrative proceedings will involve lengthy and costly hearings and which plaintiff believes will result in a finding by the said defendant confirming any assessments of cigarette taxes, interest and penalties against plaintiff with respect to any such sales;

(b) As a condition precedent to a court review of any such determinations by the defendant Tax Appeals Tribunal, plaintiff is required either to deposit with defendant Department of Taxation and Finance all taxes, interest and penalties which may be claimed to be due by the defendants or to post a bond or undertaking for such amounts, including costs, which requirements will effectively preclude court review of this issue, since plaintiff does not have the financial ability to comply with such requirements;

(c) As a matter involving the applicability and/or constitutionality of the Tax Law and its application to plaintiff, plaintiff is entitled to have same determined by a court of competent jurisdiction; and

(d) Plaintiff Attea's sales to Indians on Indian reservations in New York constitute approximately 75% - 80% of plaintiff's total sales. Plaintiff Attea has incurred substantial expenses for equipment to service its Indian accounts, including an IBM 36 computer system plus expensive software for same, and plaintiff has discontinued product lines in order to allow it to accommodate its Indian customers. In

addition, plaintiff has lost substantial non-Indian customers as a result of negative publicity generated by defendants concerning plaintiff's sales to Indians on Indian reservations. Moreover, plaintiff has substantial accounts receivable due from Indian customers, in excess of $100,000. Since all or a substantial number of plaintiff's Indian customers refuse to pay New York State taxes with respect to their purchases on Indian reservations, defendants threatened application of the Tax Law to these transactions will result in a substantial loss of business, the inability of plaintiff to collect its accounts receivable from Indians, and most likely will result in the total destruction of plaintiff's business.

25. By reason of the foregoing, plaintiff is entitled to a declaratory judgment:

(a) That the State of New York is without power to impose the aforesaid cigarette taxes with respect to any of the sales made or hereafter made by plaintiff to Indians on Indian reservations by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the New York Tax Law does not apply by its express terms to the sale of cigarettes by plaintiff to Indians on Indian reservations, and insofar as the Tax Law of the State of New York does not expressly so provide, and purports to impose the aforesaid cigarette taxes with respect to such sales, such provisions are unconstitutional;

(c) That the State of New York is otherwise without power to regulate or interface with sales of cigarettes made by plaintiff to Indians on Indian reservations and, as a result thereof, is without power to enact or enforce the New Regulations insofar as plaintiff's wholesale sales to Indians on Indian reservations are concerned; and

(d) That any assessments of cigarette taxes against plaintiff by defendants which may be imposed under and pursuant to the New Regulations or otherwise with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations are unconstitutional, illegal, null and void and of no effect.

26. By reason of the foregoing, plaintiff is also entitled to a preliminary and permanent injunction restraining and enjoining the defendants, and each of them, or any of their respective agents, employees or other persons under their control:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales;

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New

York or the New Regulations by reason of or in connection with such sales; and

(d) From otherwise interfering, regulating or attempting to interfere or regulate any such sales.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

(i) Judgment declaring:

(a) That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such states, it is unconstitutional and/or pre-empted by federal law; and

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made

by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

(ii) Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, enjoining and restraining said defendants and persons preliminarily and permanently:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

(iii) Judgment for the costs and disbursements of this action and

(iv) Judgment for such other and further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
December 20, 1988

KAVINOKY & COOK
Attorneys for Plaintiff
Office and P.O. Address
120 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 845-6000

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

Rosemary Saffire, being duly sworn, deposes and says that she is the Secretary of Milhelm Attea & Bros., Inc.; that she has read the foregoing Complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by plaintiff is because Milhelm Attea & Bros., Inc. is a corporation and the grounds of deponent's belief as to all matters in the within Complaint, not stated upon her own knowledge, are based upon investigations which deponent has caused to be made concerning

the subject matter of this action and information acquired by deponent in the course of her duties as an officer of said corporation and from the books and papers of said corporation.

Rosemary Saffire

Subscribed and sworn to before me
this 20th day of December, 1988.

GERALD T. WALSH
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 4, 1990

Exhibit "A", Annexed to Complaint—New Regulations

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171 and section 475 of the Tax Law, the Commissioner of Taxation and Finance, at an open meeting held on even date with the signing of this rule, hereby makes and adopts the following amendments to its regulations pertaining to the Cigarette Tax, by renumbering sections 331.6, 331.7 and 331.8 of Part 331 to be sections 331.7, 331.8 and 331.9 respectively, by adding new sections 331.6, and 331.10 to Part 331 and by renumbering the second section 335.2 of Part 335 to be section 335.3, and by adding new sections 335.4 and 335.5 to Part 335 of Subchapter C of such regulations, as published in Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to read as follows:

Section 1. Sections 331.6, 331.7 and 331.8 of Part 331 of the Cigarette Tax regulations are hereby renumbered to be sections 331.7, 331.8 and 331.9, respectively; and the heading of Part 331 of such regulations is hereby amended to read as follows;

PART 331
Definitions
(Statutory authority: Tax Law, §171; art. 20)

Sec.
331.1 Cigarette defined
331.2 Sale defined
331.3 Use defined
331.4 Wholesale dealer defined
331.5 Retail dealer defined
[331.6 Agent defined
331.7 City defined
331.8 State defined]
331.6 Registered dealer defined
331.7 Agent defined
331.8 City defined
331.9 State defined
331.10 Definitions relating to sales on qualified Indian reservations

Section 2. New section 331.6 is added to Part 331 of such regulations, to read as follows:

331.6 Registered dealer defined. A registered dealer is:

(a) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who (1) registers with the Department of Taxation and Finance, and (2) makes or intends to make qualified sales of cigarettes on a qualified reservation; or,

(b) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian

Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who (1) registers with the Department of Taxation and Finance and (2) makes or intends to make qualified sales of cigarettes on qualified reservations. No fee is charged for this registration. See, sections 335.4 and 335.5 of Part 335 of this Subchapter regarding the duties and obligations of registered dealers.

Section 3. New section 331.10 is hereby added to such Part, to read as follows:

331.10 Definitions relating to sales on qualified Indian reservations. (a)(1) "Qualified Indian" means a person duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(2) "Qualified Indian consumer" means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for his or her own use and consumption (i.e. other than for resale).

(b) "Exempt Indian nation or tribe" means one of the following New York State Indian nations or tribes : Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, Saint Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(c) "Qualified reservation" means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian

reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(d) "Qualified sale" means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

Section 4. The second section 335.2 of Part 335 of such regulations, relating to sales made to the State and its subdivisions, is renumbered to be section 335.3 of such Part; and the heading of Part 335 is hereby amended to read as follows:

PART 335

NONTAXABLE SALES AND USES

(Statutory authority: Tax Law, §171; art.20)

Sec.
335.1 Nontaxable sales
335.2 Nontaxable uses
[335.2] 335.3 Sales to the State and subdivisions
335.4 Indian nations or tribes, qualified Indian consumers and registered dealers
335.5 Qualified sales of cigarettes on qualified reservations

Section 5. New sections 335.4 and 335.5 are added to such Part, to read as follows:

335.4 Indian nations or tribes, qualified Indian consumers and registered dealers. (a) General. As provided for in this section and in section 335.5 of this Part, exempt

Indian nations or tribes, qualified Indian consumers and registered dealers may purchase, on qualified reservations, cigarettes without prepaying and precollecting the cigarette tax imposed by Article 20 of the Tax Law.

(b) Cigarette stamps. Although stamps are usually affixed to packages of cigarettes as evidence of payment of the tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sale to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped cigarettes are deemed to be unstamped cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamp may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(c) Indian nations or tribes. (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not precollected and prepaid the cigarette tax for its own use and consumption, or for making qualified sales, provided that the nation or tribe: (i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance; (ii) takes delivery of the cigarettes on its qualified reservation; and, (iii) uses, or intends to use,

such cigarettes for its own official use and consumption, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the Indian nation's or tribe's exempt organization number referred to in subdivision (b) of section 529.9 of this Title.

(3) Failure to comply with any of the provisions of Article 20 of the Tax Law with respect to cigarettes, or any rule or regulation pursuant to such Article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(d) Qualified Indian consumers. (1) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual: (i) takes delivery of the cigarettes on a qualified reservation; and (ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(e) Registered dealers. (1) Registration of dealers. Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to him, if the applicant:

(i)(A) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or (B) is a qualified Indian, who is also a subjobber, broker or wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii)(A) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant, and (B) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and,

(iii)(A) provides evidence to the Department that he has complied (or will comply) with any applicable tribal regulations and/or licensing procedures, and (B) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax.

(3) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the ciga-

rette tax for purposes of making qualified sales, provided that the registered dealer: (i) has received from the Department a valid certificate of registration as a dealer of cigarettes; (ii) takes delivery of such cigarettes within the boundaries of his qualified reservation; and, (iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of Article 20 of the Tax Law with respect to cigarettes, or any rule or regulation pursuant to such Article, may result in the cancellation or suspension of the registration as a dealer in cigarettes.

(f) Exemption certificates and other records. (1) The exemption certificates prescribed in subdivisions (c), (d) and (e) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an additional bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such product. In addition, such evidence of each exempt transaction must be retained by the seller; and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating these individual bills, invoices, receipts and other forms of written evidence with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette tax agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax returns.

335.3 Qualified sales of cigarettes on qualified reservations. (a) General applications. (1) The cigarette tax imposed pursuant to Article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such product is ultimately purchased on such reservation by a qualified Indian for his own personal use and consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax if the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation—regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer—are subject to the state cigarette excise tax.

(b) Sales by agents. (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and precollected for purposes of making qualified sales, if that agent—with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe—sells and delivers such cigarettes to: (i) an exempt Indian nation or tribe; (ii) a registered dealer; or (iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette stamping agent (and its employees while working for such agent) may possess cigarettes for sale in this state and transport such cigarettes onto a qualified reservation located in this state without prepaying and precollecting the cigarette tax. However, as provided in section 335.4 of this Part, subsequent qualified sales may be made solely on such qualified

reservation. Properly completed exemption certificates must be received by all sellers of cigarettes located on qualified reservations, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette stamping agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) Approval for delivery required. (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval of that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval of the Department regarding the amount of cigarettes to be sold and delivered without prepayment and

precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) Basis for approval by Department. If applicable, Departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(1) In determining such probable demand, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or,

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the federal Bureau of Indian Affairs).

(2) In determining such trade territory, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(3) In addition, the Department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(4) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the Department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to paragraphs (1)(ii) and (2)(ii) of this subdivision.

(5) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the Department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Limitations on sales. Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.4 of this Part. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay and precollect the cigarette tax at the time of purchase by way of remitting the tax to the seller as part of the purchase price of the cigarettes.

Section 6. This rule shall be promulgated immediately; provided, however, that this rule shall not apply where and to the extent that alternative reporting and/or tax mechanisms have been negotiated between the Executive Branch of the State of New York acting by the Department of Taxation and Finance and any State or federally recognized Indian nation occupying a State or federally recognized reservation and acting by a tax committee or other duly-authorized negotiating entity, and the agreement resulting from such negotiations has, to the extent required by law, either been approved by enacted amendments to the laws of the State of New York and relevant tribal laws, or has been jointly submitted by the Executive Branch and such Indian nation or nations to the New York State Legislature for its consideration and approval; provided, further, the provisions of this rule shall be effective on November 30, 1988; provided, further, that during the first thirty-one days after this rule shall take effect, the Department of Taxation and Finance will register applicants who, or which, wish to make qualified sales of cigarettes on qualified reservations; provided, further, that the amendments of this rule which limit the sale of cigarettes upon which the tax has not been

passed through by cigarette tax agents shall take effect on the thirty-first day after the day this rule is effective.

Dated: Albany, New York
August 29, 1988

/s/ James W. Wetzler
James W. Wetzler
Commissioner of Taxation and Finance

Order to Show Cause (Index No. 7-89).

At an IAS Special Term, Part ____ of the Supreme Court of the State of New York held in and for the County of Albany, at the Albany County Courthouse, Albany, New York, on the 30th day of December, 1988.

Present: Hon. EDWARD S. CONWAY, Justice Presiding

[Same Title]

Upon the summons and complaint herein, verified on the 20th day of December, 1988, and the affidavit of Rosemary Saffire, sworn to the 20th day of December, the affidavit of Eli Tarbell, sworn to the 19th day of December, 1988, and the respective exhibits annexed thereto, it is

ORDERED, that the defendants show cause before this court at Term, ____ to be held at the Albany County Courthouse, Albany, New York, on the 9th day of January, 1989 of that day why an order should not be entered herein, pursuant to CPLR 6311, granting plaintiff a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees or other persons acting under their direction or control: (a) from determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative pro-

ceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering, regulating or attempting to interfere or regulate any such sales; and it is further

ORDERED, that defendants, and each of them, show cause why an order should not be entered granting the plaintiff such other and further relief as to this court may seem just and proper; and it is further

ORDERED, that service of a copy of this order, together with the papers annexed hereto on the defendants and the Attorney General of the State of New York before the 30th day of December, 1988, shall be deemed sufficient service hereof.

s/ EDWARD S. CONWAY
Justice of the Supreme Court
Albany County

Signed: 12-30-88
Albany, NY

Exhibit "D" Annexed to Affidavit of Saffire. Notice to Registered Distributors of Motor Fuel, Diesel Motor Fuel and Licensed Cigarette Agents Regarding Sales of Tax-Free Product on Indian Reservations

The Department of Taxation and Finance has amended its administrative systems to permit nontaxable sales of motor fuel, diesel motor fuel and cigarettes on Native American Indian reservations (located in New York) to nations and tribes, and their enrolled members for their own personal use.

Effective January 1, 1989, only registered distributors of motor fuel and diesel motor fuel and licensed cigarette agents may sell tax-free product either to an Indian nation or to a "registered dealer," under the conditions described below. The amount of tax-free product destined for sale on each reservation is based upon a determination of the probable consumption of qualified Indian consumers on each reservation. The reservation allotment of tax-free product will then be allocated among the registered dealers located on that reservation by means of a tax exemption coupon. There are no quantity limitations of tax-paid product sold to an Indian nation or registered dealer on a reservation.

Tax-Free Sales to Registered Dealers

A "registered dealer" is a retail or wholesale dealer located on a reservation who registers with the Department (under this new system) to purchase tax-free product for resale to Indian nations, other registered dealers, or qualified Indian consumers. Each month registered dealers will receive "Tax Exemption Coupon for Registered Dealers" from the Tax Department entitling them to make purchases of motor fuel, diesel motor fuel and/or cigarettes on which

the applicable prepaid excise and sales taxes have not been passed through.

To purchase tax-free product from you, the registered dealer must complete the tax exemption coupon, submit the Department copy (white) and the Distributor/Agent copy (pink) to you and keep the Dealer copy (yellow). The registered dealer must submit the tax exemption coupon to you before or at the time of delivery of the product.

You must keep the Distributor/Agent copy (pink) for your records and submit the Department copy (white) within 5 days of delivery of the tax-free product to the Audit Division / FACCTS - Indian Matters at the address on page 4.

You may sell tax-free product only to the registered dealer named on the coupon and deliver the product only to the locations specified on the coupon. In addition, the amount of tax-free product sold may not exceed the preprinted amount authorized by the coupon. If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you must collect all applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so, you will be held liable for the tax due.

Tax exemption coupons will be issued in denominations of 7,500 gallons for gas and diesel fuel and 400 packs for cigarettes, unless another quantity is specified by the registered dealer. If the actual amount sold is less than the preprinted amount of the coupon, the registered dealer should indicate the actual amount purchased in the space provided and present the coupon to you. Upon receipt of the coupon from you, the Department will issue the registered dealer another coupon for the difference between the preprinted amount and the actual amount sold.

Tax-Free Sales to Indian Nations

For Governmental Use

When you make a tax-free sale of motor fuel or diesel motor fuel to an Indian nation on a qualified reservation (for use or consumption and not for resale by such nation or tribe) you must obtain or already have on file a properly completed "Certificate of Tax Exemption for Qualified Indian Nations or Tribes on Purchases of Motor Fuel, Diesel Motor Fuel, and Cigarettes," Form FT-939, to substantiate the exempt status of the sale. (Exempt Indian nations and tribes and qualified reservations are listed on page 4.)

This exemption document may not be used to purchase tax-free product for resale by nation-owned or operated businesses.

For Resale

Nation-owned or operated businesses are subject to the reservation probable consumption limitations. Therefore, such businesses must use the tax exemption coupon as described above for registered dealers.

If the sale exceeds the preprinted amount of the coupon or if you do not obtain a coupon for a sale made to a nation business, you must collect all applicable taxes. If you fail to do so, you will be held liable for the tax due.

Reporting Tax-Free Sales

Distributors and agents must maintain accurate records of all sales, including the substantiation of exempt sales described above. The tax-free sales described in this notice

should be reported on the schedules and monthly returns as follows:

Motor Fuel

For the motor fuel excise tax, tax-free sales must be listed on "Combined Schedules 8 and 9 - Sales to the United States Government, N.Y. State and Municipalities." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on line 13 of your "Return of Tax on Motor Fuels," Form MT-104.

For the prepaid sales tax, you take a credit for sales to exempt purchasers on line 10a of your "Report of Sales Tax Prepayment on Motor Fuel," Form FT-945.

Diesel Motor Fuel

For the diesel motor fuel excise tax, tax-free sales must be listed on "Schedule 9 - Sales to the United States Government, New York State and Municipalities." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on the appropriate line of your "Return of Tax on Diesel Motor Fuel," Form MT-1000. (Line numbers on form MT-1000 are subject to change.)

For the prepaid sales tax, you take a credit for sales to exempt purchasers on line 4a of your "Report of Sales Tax Prepayment on Diesel Motor Fuel," Form FT-1045.

Cigarettes

For the cigarette excise tax, tax-free sales must be listed on "Sales of Cigarettes to Registered Dealers - Schedule D-1." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on line 6B of your "Resident Agent Cigarette Tax Return," Form CG-6 or on line 9B of your "Non-Resident Agent Cigarette Tax Return," Form CG-7.

Should You Register As A Dealer?

Registered 12-A motor fuel or diesel motor fuel distributors, or licensed cigarette agents making retail sales on Indian reservations, must also register as dealers. You need not register if you merely accept tax exemption coupons from registered dealers or tribal businesses, or accept the exemption document for the nation's governmental uses (Form FT-939) from Indian nations.

Exempt Indian Nations and Tribes and Qualified Reservations

Nations and tribes

State and federal law define "exempt Indian nations and tribes" as the following New York State Indian nations and tribes:

Cayuga
Oneida Indian Nation
Onondaga Nation of Indians
Poospatuck
Saint Regis Mohawk
Seneca Nation of Indians
Shinnecock
Tonawanda Band of Senecas
Tuscarora Nation of Indians

Reservations

Qualified reservations are limited to the following reservations of exempt Indian nations and tribes located in New York State.

Allegany Indian Reservation
Cattaraugus Indian Reservation
Oil Spring Indian Reservation
Oneida Indian Territory
Onondaga Indian Reservation
Poospatuck Indian Reservation
Saint Regis Indian Reservation
Shinnecock Indian Reservation
Tonawanda Indian Reservation
Tuscarora Indian Reservation

If you need additional information or an application to become a registered dealer

Call: (518) 457-0465
or
Write: NYS Department of Taxation and Finance
Audit Division / FACCTS - Indian Matters
W. A. Harriman Campus
Albany, New York 12227

Summons (Index No. 8-89).

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street,
Clarence, NY 14031

Plaintiff,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

Index No. 8-89

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with a summons, to serve a notice of appearance, on the plaintiff's attorney(s) within **20** days after the service of this summons, exclusive of the day of service, or within **30** days after completion of service where service is made in any other manner than by personal delivery within the State. In case of your failure to appear or answer, judgment may be taken against you by default for the relief demanded in the complaint.

Albany County is designated as the place of trial on basis of residence of the Defendants who resides at State Campus, Albany, NY

DATED:

Buffalo, New York
December 29, 1988

Timothy M. O'Mara, Esquire
WILLIAMS, STEVENS, McCARVILLE
& FRIZZELL, P.C.
1920 Liberty Building
Buffalo, New York 14202

Verified Complaint (Index No. 8-89).

[Same Title]

Plaintiff by his attorneys Williams, Stevens, McCarville & Frizzell, P.C. by Timothy M. O'Mara of council (sic) for its complaint herein alleges as follows:

1. At all times hereinafter mentioned, plaintiff ELIAS H. ATTEA, JR., DBA JR ATTEA WHOLESALE (hereinafter referred to as "Attea"), was and still is an individual lawfully conducting business as an Indian Trader under licenses issued by the United States Department of the Interior Bureau of Indian Affairs with a place of business in the State of New York at the address specified above.

2. Upon information and belief, defendant James W. Wetzler is the Commissioner of Taxation and Finance of the State of New York, and the head of defendant Department of Taxation and Finance of the State of New York (the "Department of Taxation and Finance").

3. Upon information and belief, defendant James W. Wetzler, as the Commissioner of Taxation and Finance is responsible pursuant to §170 and §171 of the Tax Law of the State of New York.

4. Upon information and belief, defendant Tax Appeals Tribunal of the State of New York (the "Tax Appeals Tribunal") is a body consisting of three commissioners responsible for the administration of the division of tax appeals pursuant to Article 40 of the New York Tax Law.

5. At all times hereinafter mentioned, plaintiff was and still is a wholesale dealer of cigarettes licensed under The United States Department of Interior Bureau of Indian Affairs, Title 25 Code of Federal Regulations Part 251 and was and still is engaged in, among other things, the wholesale distribution and sale of cigarettes to various Indian reservations in New York.

6. At all times pertinent, plaintiff Attea was and still is distributing and making wholesale sales of cigarettes to Indians on Indian reservations located within the territorial boundaries of the State of New York, which Indian reservations include, but are not limited to, the Allegany Indian Reservation, the Cattaraugus Indian Reservation, the Tonawanda Indian Reservation, the Tuscarora Indian Reservation, the Onondaga Indian Reservation and the Saint Regis Indian Reservation, which reservations are sovereign territories of sovereign American Indian Tribes.

7. Pursuant to New York Tax Law §471, a tax is imposed on all cigarettes possessed in the State by any person for sale, subject to certain exceptions, including the exception that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax...."

8. The State of New York does not have the power to impose or levy cigarette taxes pursuant to Article 20 of the New York Tax Law with respect to the aforesaid sales of cigarettes by plaintiff to Indians or Indian reservations nor does the State of New York have the power to regulate such business transactions conducted on Indian reservations, because, *inter alia*, pursuant to the United States Constitution, Article 1, section 8, clause 3, Congress has the sole power to regulate commerce with the Indian Tribes and the laws of the United States enacted pursuant thereto, in particular, the Indian Trader Statutes, 25 U.S.C. §§261 et seq., and regulations enacted thereunder which govern trade with Indians on Indian reservations, have pre-empted such state taxes, laws and regulations.

9. In addition, Indians on Indian reservations are immune from state taxation unless such state taxation is specifically authorized by the Congress of the United States.

10. The defendants have long recognized the tax immunity of Indians on Indian reservations, and the pre-emptive effect of federal law with respect to wholesale sales of cigarettes by plaintiff Attea to such Indians.

11. Notwithstanding the foregoing, and on or about August 29, 1987, defendant Department of Taxation and Finance of the State of New York adopted certain regulations which purport to apply New York's Tax Law to plaintiff's sales of cigarettes to Indians on Indian reservations and require the collection of New York cigarette taxes with respect to such sales as well as comprehensively regulate such sales. A copy of such regulations (hereinafter referred to as the "New Regulations") is annexed hereto as Exhibit "A".

12. The New Regulations, by their very terms, became effective on November 30, 1988; provided, however, that from such date of effectiveness to and including December 31, 1988, the New Regulations provide for a grace period when the defendants will register Indian Tribes and "registered dealers" as that term is defined in the New Regulations.

13. By reason of the foregoing, the New Regulations are in full force and effect and by their terms, purport to apply to transactions occuring on and after January 1, 1989. *See,* New Regulations, pages 17-18.

14. Pursuant to the New Regulaitons, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, except as to certain limited quantities approved by the defendant Department of Taxation and Finance or in some circumstances as agreed between defendant Department of Taxation and Finance and the Indian Tribe, subject to the other terms and limitations of such New Regulations. *See,* New Regulations pages 11-15, §§333.5(e); 335.5(b)(3), *et. seq.*

15. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian reservations in New York, unless such cigarettes are sold to certain Indians on such reservations who fulfill comprehensive requirements of defendant Department of Taxation and Finance, including registration with said defendant as a "Registered Dealer",

subject to the other terms and limitations of such New Regulations. *See,* New Regulations, pages 7-8, 11-12, §§335.4(e), 335l.5(b).

16. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian Tribes or nations in New York unless such Tribes or nations themselves obtain a valid exempt organization certificate issued by defendant Department of Taxation and Finance, and otherwise comply with the terms and limitations of such New Regulations. *See,* New Regulations, pages 5-6, §335.4(c).

17. Pursuant to the New Regulations, defendants also seek to impose upon wholesale distributors such as plaintiff Attea certain additional and special record keeping requirements with respect to sales to Indians on Indian reservations, including but not limited to receiving and retaining exemption certificates from Indian purchasers of untaxed cigarettes sold by plaintiff pursuant to the regulations, copies of invoices or other written evidence of such sales signed by the Indian purchasers taking delivery of such cigarettes, records of the Tribe's exempt organization number or the Registered Dealer's registration number, and other documents, all subject to the terms and limitations of such New Regulations. *See,* New Regulations, pages 6-7, §335.4(a).

18. Because Article 20 of the Tax Law, and in particular, Tax Law §471 thereof, expressly provides that "no tax shall be imposed on cigarettes sold under circumstances that this state is without power to impose such tax. . . ." the

aforesaid statute which imposes such cigarette taxes, by its own terms, does not apply to the sale and delivery of cigarettes made by plaintiff to Indians on Indian reservations as set forth above and, by reason of the foregoing, the New Regulations adopted by the defendant cannot be enforced with respect to sales made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York.

19. In addition to the foregoing, to the extent that Article 20 of the New York Tax Law may be applied by defendants to plaintiff's transactions with Indians on Indian reservations, and to the extent that any of the provisions of Article 20 of the New York Tax law do not, by their terms, expressly provide that same are not applicable to sales of the cigarettes made when "sold under such circumstances that this state is without power to impose such tax. . . ." said provisions are unconstitutional on their face or insofar as same are applied or may be applied pursuant to the New Regulations or otherwise to the sales of cigarettes made by plaintiff to Indians on Indian reservations and, by reason of the foregoing, said provisions and such application are preempted by federal law.

20. In addition to the foregoing, Indians on Indian reservations are immune from such State taxation and cannot be compelled, pursuant to the New Regulations or otherwise, to pay cigarette taxes to the plaintiff with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations.

21. Plaintiff's Indian customers are desirous of making wholesale purchases of cigarettes from the plaintiff but have refused to pay State taxes to the plaintiff with respect to

such purchases and have otherwise refused to be regulated by the defendant Department of Taxation and Finance with respect to such purchases.

22. By reason of the foregoing, there is presented for consideration and determination in this action the question of the power and jursidiction of the defendants to impose cigarette taxes upon plaintiff's wholesale sales of cigarettes to Indians on Indian reservations, and the question of the power and jurisdiction of the defendants to otherwise regulate such transactions.

23. A declaratory judgment with respect to the issue herein involved will settle directly, expeditiously and with finality the aforesaid controversy.

24. Plaintiff will suffer irreparable damage and is without an adequate remedy at law and is therefore entitled to a declaratory judgment of its rights regarding the application and legal effect of New York's Tax Law upon plaintiff in connection with the subject of this action, and is entitled to a preliminary and permanent injunction against the defendants in connection therewith, because of the foregoing reasons and for the following reasons:

(a) Plaintiff will unnecessarily be subjected to various administrative proceedings before defendant New York Tax Appeals Tribunal in order to contest any determinations hereinafter made by the defendants with respect to sales made by plaintiff to Indians on Indian reservations subsequent to the effective date of the New Regulations, which administrative proceedings will involve lengthy and costly hearings and which plaintiff believes will result in finding

by the said defendant confirming any assessments of cigarette taxes, interest and penalties against plaintiff with respect to any such sales;

(b) As a condition precedent to a court review of any such determinations by the defendant Tax Appeals Tribunal, plaintiff is required to either deposit with defendant Department of Taxation and Finance all taxes, interest and penalties which may be claimed due the defendants or to post a bond or undertaking for such amounts, including costs, which requirements will effectively preclude court review of this issue, since plaintiff does not have the financial ability to comply with such requirements;

(c) As a matter involving the applicability and/or constitutionality of the Tax Law and its application to plaintiff, plaintiff is entitled to have same determined by a court of competent jurisdiction; and

(d) Plaintiff Attea's sales to Indians on Indian reservations in New York constitute approximately 100% of plaintiff's total sales. Plaintiff Attea has incurred substantial expenses for equipment to service its Indian accounts, and plaintiff has not increased product lines to others in order to allow it to accommodate its Indian customers. In addition, plaintiff has lost substantial non-Indian customers as a result of negative publicity generated by defendants concerning plaintiff's sales to Indians on Indian reservations. Moreover, plaintiff has substantial accounts receivable due from Indian customers, in excess of $100,000. Since all or a substantial number of plaintiff's Indian customers refuse to pay New York State taxes with respect to their purchases on Indian reservations, defendants threatened application of the Tax Law to these transactions will result in a substantial loss

of business, the inability of plaintiff to collect its accounts receivable from Indians, and most likely will result in the total destruction of plaintiff's business.

25. By reason of the foregoing, plaintiff is entitled to a declaratory judgment:

(a) That the State of New York is without power to impose the aforesaid cigarette taxes with respect to any of the sales made or hereafter made by plaintiff to Indians on Indian reservations by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the New York Tax Law does not apply by its express terms to the sale of cigarettes by plaintiff to Indians on Indian reservations, and insofar as the Tax Law of the State of New York does not expressly so provide, and purports to impose the aforesaid cigarette taxes with respect to such sales, such provisions are unconstitutional;

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations and, as a result thereof, is without power to enact or enforce the New Regulations insofar as plaintiff's wholesale sales to Indians on Indian reservations are concerned; and

(d) That any assessments of cigarette taxes against plaintiff by defendants which may be imposed under and pur-

suant to the New Regulations or otherwise with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations are unconstitutional, illegal, null and void and of no effect.

26. By reason of the foregoing, plaintiff is also entitled to a preliminary and permanent injunction restraining and enjoining the defendants, and each of them, or any of their respective agents, employees or other persons under their control:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales;

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales; and

(d) From otherwise interfering, regulating or attempting to interfere or regulate any such sales.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

(i) Judgment declaring:

(a) That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

(ii) Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, enjoining and restraining said defendants and persons preliminarily and permanently:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore

made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

(iii) Judgment for the costs and disbursements of this action; and

(iv) Judgment for such other and further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
December 29, 1988

Williams, Stevens, McCarville &
Frizzell, P.C.
Timothy M. O'Mara of Council (sic)
Attorneys for Plaintiff
Office and P.O. Address
1920 Liberty Building
Buffalo, New York 14202
Tel: (716) 856-2112

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ERIE) SS:

ELIAS H. ATTEA, JR., being duly sworn, deposes and says that he is the Plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ELIAS H. ATTEA, JR.

Subscribed and sworn to
before me this 29 day
of December, 1988

TIMOTHY M. O'MARA
Notary Public

TIMOTHY M. O'MARA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1989

Order to Show Cause (Index No. 8-89).

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

[SAME TITLE]

Upon the summons and complaint herein, verified on the 29th day of December, 1988, and the affidavit of ELIAS H. ATTEA, JR., sworn to the 29th day of December, 1988, the respective exhibits annexed thereto, it is

ORDERED, that the defendants show cause before this court at Term, to be held at the Albany County Courthouse, Albany, New York, on the 9th day of January, 1989, why an order should not be entered herein, pursuant to CPLR 6311, granting plaintiff a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees or other persons acting under their direction or control: (a) from determining, collecting or attempting to collect cigarette taxes with respect to the sale of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering, regulating or attempting to interfere or regulate any such sales; and it is further

ORDERED, that defendants, and each of them, show cause why an order should not be entered granting the

plaintiff such other and further relief as to this court may seem just and proper; and it is further

ORDERED, that service of a copy of this order, together with the papers annexed hereto on the defendants and the Attorney General of the State of New York before 30th day of December, 1988, shall be deemed sufficient service hereof.

Signed: 12-30-88
Albany, N.Y.

s/Edward S. Conway
Justice of the Supreme Court
Albany County

Letter Decision Hon. Paul E. Cheeseman (J.S.C.).

STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURT HOUSE
ALBANY 12207

January 18, 1989

Kavinoky & Cook, Esqs.
Attorneys for Milhelm Attea & Sons
Joseph E. Zdarsky, of Counsel
120 Delaware Avenue
Buffalo, New York 14202

Williams, Stevens, McCarville
& Frizzell, P.C.
Attorneys for Elias H. Attea, Jr.
Timothy M. O'Mara of Counsel
1920 Liberty Building
Buffalo, New York 14202

Hon. Robert Abrams, Attorney General
of the State of New York
Attorneys for Defendant
Richard Freshour, Assistant Attorney
General, of Counsel
The Capitol
Albany, New York 12224

Re: Milhelm Attea & Bros., Inc.
-v- Department of Taxation & Finance of the State of N.Y. & JamesW. Wetzler, et al (FIRST ACTION)

and

Elias H. Attea, Jr. -v- James W. Wetzler, as Commissioner of Taxation & Finance of the State of N.Y., et al (SECOND ACTION)

Gentlemen:

Upon the question of issuance of a preliminary injunction, this Court is satisfied that the plaintiffs in both action have established at this stage of the proceeding, a reasonable likelihood of success (*Herzog Brothers Trucking v. New York State Tax Commission*, 69 NY2d 536; *Dougal v. County of Suffolk*, 87 AD2d 897) that there is no adequate remedy at law and that irreparable harm would be inflicted upon plaintiffs which could not be recovered should plaintiffs be successful (*Social Spirits, Inc. v. Town of Colonie*, 70 AD2d 1036).

Accordingly, plaintiff's motion for a preliminary injunction shall be granted. The injunction shall issue upon the condition that plaintiffs file an undertaking in the sum of $2,500.00. All papers to attorneys for plaintiffs who are to submit a single order in conformance herewith.

Very truly yours,

s/Paul E. Cheeseman
PAUL E. CHEESEMAN
J.S.C.

PEC:cb

Order Granting Preliminary Injunction.

At a Special Term of the
Supreme Court of the State
of New York held in and for
the County of Albany at the
Albany County Courthouse,
Albany, New York on the
17th day of January, 1989.

PRESENT: Hon. Paul E. Cheeseman, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

(FIRST ACTION)
Index No. 7-89
RJI No. 0189017023
Justice Assigned:
Hon. Paul E. Cheeseman

and

ELIAS H. ATTEA, JR., 6175 Stickler Street,
Clarence, New York 14031

Plaintiff

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants

(SECOND ACTION)
Index No. 8-89
RJI No. 0189017022
Justice Assigned:
Hon. Paul E. Cheeseman

The plaintiffs in each of the above referenced actions having each made a motion for an order pursuant to CPLR §6311 granting a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees, or other persons acting under their direction or control; (a) from determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes made or hereafter made by the respective plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the respective plaintiffs by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions

of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales; and said motions have regularly come on to be heard before the undersigned Justice of the Supreme Court and the undersigned Justice of the Supreme Court having heard a joint argument with respect to said motions,

NOW, THEREFORE, as to First Action referred to above, upon reading and filing the Order the Show Cause granted by the Honorable Edward S. Conway, J.S.C., on the 30th day of December, 1988, the summons and complaint verified on the 20th day of December, 1988, the affidavit of Rosemary Saffire, sworn to the 20th day of December, 1988, the affidavit of Eli Tarbell, sworn to the 19th day of December, 1988, the affidavit of Joseph E. Zdarsky, sworn to the 14th day of January, 1989 and the affidavit of Joseph Anderson, sworn to the 14th day of January, 1989 and the respective exhibits annexed thereto all in support of the motion of the plaintiff in the First Action and upon reading and filing the affidavits of Richard J. Freshour, Frank Munoz and William F. Collins, all sworn to on the 9th day of January, 1989, and the exhibits annexed thereto, all in opposition to the motion of the plaintiff in the First Action; and as to the Second Action referred to above, upon reading and filing the order to show cause granted by the Honorable Edward S. Conway, J.S.C. on the 30th day of December, 1988, the summons and complaint verified by the plaintiff in said action on the 29th day of December, 1988 in said action and the affidavit of Elias H. Attea, Jr., sworn to the 29th day of December, 1988 and the respective exhibits annexed thereto, all in support of the plaintiff's motion in said action, and upon reading and filing the affidavit of Richard J. Freshour, the affidavit of Frank Munoz and the

affidavit of William F. Collins, all sworn to the 9th day of January, 1989 and the respective exhibits annexed thereto in opposition to said motion and after hearing Kavinoky & Cook, Joseph E. Zdarsky, Esq., of counsel, attorneys for Milhelm Attea & Bros., Inc., the plaintiff in the First Action referred to above in support of the motion of the plaintiff in said action and Williams, Stevens, McCarville & Frizzell, P.C., Timothy M. O'Mara, Esq., of counsel, attorneys for Elias H. Attea, Jr., the plaintiff in the Second Action referred to above in support of the motion of the plaintiff in said action and the Honorable Robert Abrams, Attorney General of the State of New York, Richard J. Freshour, Esq., Assistant Attorney General, of counsel, attorneys for the defendants in each of the said actions in opposition to the said motions; and due deliberation having been had thereon, and the Court having rendered its written decision dated January 18, 1989; it is

ORDERED that the respective motions of Milhelm Attea & Bros., Inc., the plaintiff in the First Action above, and Elias H. Attea, Jr., the plaintiff in the Second Action above, for preliminary injunctions, be and the same hereby are granted as hereinafter set forth; and it is further

ORDERED that the undertaking for Milhelm Attea & Bros., Inc. the plaintiff in the First Action is hereby fixed in the sum of $2,500 and the preliminary injunction in its favor as hereinafter set forth shall issue upon the condition that said plaintiff file an undertaking in the sum of $2,500 and that the undertaking for Elias H. Attea, Jr. the plaintiff in the Second Action is hereby fixed in the sum of $2,500 and the preliminary injunction in his favor as hereinafter set forth shall issue upon the condition that said plaintiff file an undertaking in the sum of $2,500; and it is further

ORDERED that during the pendency of the First Action referred to above, the defendants therein and each of them,

and their respective agents, employees or other persons acting under their direction and control are hereby enjoined and restrained (a) from determining, collecting or attempting to collect any cigarette taxes with respect to the sales of cigarettes made or hereafter made by Milhelm Attea & Bros., Inc., the plaintiff in said action, to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving Milhelm Attea & Bros., Inc., the plaintiff in the said action by reason of the said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales; and it is further

ORDERED that during the pendency of the Second Action referred to above, the defendants therein and each of them, and their respective agents, employees or other persons acting under their direction and control are hereby enjoined and restrained (a) from determining, collecting or attempting to collect any cigarette taxes with respect to the sales of cigarettes made or hereafter made by Elias H. Attea, Jr., the plaintiff in said action, to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving Elias H. Attea, Jr., the plaintiff in the said action by reason of the said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations

promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales.

Dated: Albany, New York
January 19, 1989

ENTER.

s/Paul E. Cheesemen
PAUL E. CHEESEMAN
Honorable Paul E. Cheeseman
Justice of the Supreme Court

0540OK

s/Thomas G. Clingan, EB
1-19-89

Verified Answer (Index No. 7-89).

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC. 1509 Clinton Street, Buffalo, New York 14206,

Plaintiffs,

against

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 7-89

RJI No. 0189 017023
Assigned Justice: Cheeseman

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, as and for their verified

answer and defenses to the complaint herein, respectfully allege as follows:

FIRST: Admit the allegations contained in paragraphs 2, 3, 12 and 13 thereof.

SECOND: Deny the allegations contained in paragraphs 8, 18, 19, 25 and 26 thereof.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 6 and 21 thereof.

FOURTH: Admit the allegations contained in paragraph 4, but deny that the defendant Tax Appeals Tribunal of the State of New York is a proper party to this proceeding.

FIFTH: With respect to the allegations contained in paragraph 5, deny knowledge or information sufficient to form a belief as to whether or not the plaintiff "was and still is engaged in . . . the wholesale distribution and sale of cigarettes in New York."

SIXTH: With respect to the allegations contained in paragraph 7, affirmatively allege that New York Tax Law §471 is the best evidence of its contents and speaks for itself.

SEVENTH: With respect to the allegations contained in paragraphs 9, 20 and 23, affirmatively allege that those paragraphs set forth conclusions of law which the defendants are neither required to admit nor deny.

EIGHTH: Deny the allegations contained in paragraph 10 and further affirmatively allege that those allegations are irrelevant to the matters raised in the instant complaint inasmuch as those allegations refer to a period prior to the effective date of the regulations which are being challenged.

NINTH: With respect to the allegations contained in paragraphs 11, admit that the regulations annexed as Exhibit A to the complaint were adopted, but deny the remaining allegations contained in that paragraph.

TENTH: With respect to the allegations contained in paragraph 14, deny that the taxing scheme complained of herein imposes taxes upon wholesale distributors and affirmatively allege that any taxes which are being imposed have their legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and further deny that the volume of exempt cigarettes is limited as to quantity.

ELEVENTH: Deny so much of the allegations contained in paragraph 15 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall on the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

TWELFTH: Deny so much of the allegations contained in paragraph 16 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall on the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

THIRTEENTH: Deny the allegations contained in paragraph 17 and affirmatively allege that the New Regulations referred to therein are the best evidence of their contents and speak for themselves.

FOURTEENTH: Deny the allegations contained in paragraph 22 inasmuch as no cigarette taxes are being imposed upon the plaintiff or other similarly situated entities like the plaintiff.

FIFTEENTH: Deny the allegations contained in paragraph 24, except as to the allegations contained in subparagraph (d), and deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in that subparagraph.

AS AND FOR A FIRST DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

SIXTEENTH: The Tax Appeals Tribunal is not a proper party to this proceeding inasmuch as the plaintiff sets forth no claims of wrongdoing on the part of that body.

AS AND FOR A SECOND DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

SEVENTEENTH: This matter is not ripe for adjudication.

AS AND FOR A THIRD DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

EIGHTEENTH: The plaintiff lacks standing.

AS AND FOR A FOURTH DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

NINETEENTH: These regulations do not impermissibly impact on Indian traders so as to be declared constitutionally infirm.

WHEREFORE, it is respectfully requested that the complaint be dismissed and the relief sought therein denied in all respects and the subject regulations be upheld in all respects.

Dated: Albany, New York
January 20, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12227
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: KAVINOKY & COOK
Attorneys for Plaintiffs
120 Delaware Avenue
Buffalo, New York 14202

STATE OF NEW YORK)
) s.s.:
COUNTY OF ALBANY)

TERRENCE M. BOYLE, being duly sworn, deposes and says:

I am an attorney employed by the New York State Department of Taxation and Finance and the Director of the New York State Department of Taxation and Finance Law Bureau. I have read the foregoing answer and know the contents thereof and the same is true to my knowledge except as to those matters thereon stated on information and belief and as to those matters I believe them to be true. This verification is made by me pursuant to CPLR 3020(d) (2). The reason why this verification is made by me is that the primary respondent in interest is the Commissioner of the New York Department of Taxation and Finance. The sources of my information and the grounds for my belief as to those matters not stated upon my knowledge are statements and reports of officers and employees of the respondent Commissioner of the Department of Taxation and Finance and documents and correspondence in my possession.

TERRENCE M. BOYLE

Sworn to before me this
20th day of January, 1989

GEORGE BLASSMAN
NOTARY PUBLIC

GEORGE BLASSMAN
Notary Public 02BL4761759
Albany County
Commission Expires 11/30/90

Verified Answer (Index No. 8-89)

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, NY 14031,

Plaintiffs,

against

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 8-89
RJI No. 0189 017022
Assigned Justice:
Cheeseman

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, as and for their verified answer and defenses to the complaint herein, respectfully allege as follows:

FIRST: Admit the allegations contained in paragraphs 2, 3, 12 and 13 thereof.

SECOND: Deny the allegations contained in paragraphs 8, 10, 11, 18, 19, 22, 25 and 26 thereof.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 5, 6 and 21 thereof.

FOURTH: Admit the allegations contained in paragraph 4, but deny that the defendant Tax Appeals Tribunal of the State of New York is a proper party to this proceeding.

FIFTH: With respect to the allegations contained in paragraph 7, affirmatively allege that New York Tax Law §471 is the best evidence of its contents and speaks for itself.

SIXTH: With respect to the allegations contained in paragraphs 9, 20, and 23, affirmatively allege that those paragraphs set forth conclusions of law which the defendants are neither required to admit nor deny.

SEVENTH: With respect to the allegations contained in paragraph 14, deny that the taxing scheme complained of herein imposes taxes upon wholesale distributors and affirmatively allege that any taxes which are being imposed have their legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and further deny that the volume of exempt cigarettes is limited as to quantity.

EIGHTH: Deny so much of the allegations contained in paragraph 15 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax

which is imposed has its legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

NINTH: Deny so much of the allegations contained in paragraph 16 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

TENTH: Deny the allegations contained in paragraph 17 and affirmatively allege that the New Regulations referred to therein are the best evidence of their contents and speak for themselves.

ELEVENTH: Deny the allegations contained in paragraph 24, except as to the allegations contained in subparagraph (d), and deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in that subparagraph.

AS AND FOR A FIRST DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

TWELFTH: The Tax Appeals Tribunal is not a proper party to this proceeding inasmuch as the plaintiff sets forth no claims of wrongdoing on the part of that body.

AS AND FOR A SECOND DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

THIRTEENTH: This matter is not ripe for adjudication.

AS AND FOR A THIRD DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

FOURTEENTH: The plaintiff lacks standing.

AS AND FOR A FOURTH DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

FIFTEENTH: These regulations do not impermissibly impact on Indian traders so as to be declared constitutionally infirm.

WHEREFORE, it is respectfully requested that the complaint be dismissed and the relief sought therein denied in all respects and the subject regulations be upheld in all respects.

Dated: Albany, New York
January 20, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12227
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: TIMOTHY M. O'MARA, ESQ.
WILLIAMS, STEVENS, McCARVILLE
& FRIZZELL, P.C.
Attorneys for Plaintiffs
1920 Liberty Building
Buffalo, New York 14202

STATE OF NEW YORK)
) s.s.:
COUNTY OF ALBANY)

TERRENCE M. BOYLE, being duly sworn, deposes and says:

I am an attorney employed by the New York State Department of Taxation and Finance and the Director of the New York State Department of Taxation and Finance Law Bureau. I have read the foregoing answer and know the contents thereof and the same is true to my knowledge except as to those matters thereon stated on information and belief and as to those matters I believe them to be true. This verification is made by me pursuant to CPLR 3020(d)(2). The reason why this verification is made by me is that the primary respondent in interest is the Commissioner of the New York State Department of Taxation and Finance. The sources of my information and the grounds for my belief as to those matters not stated upon my knowledge are statements and reports of officers and employees of the respondent Commissioner of the Department of Taxation and Finance and documents and correspondence in my possession.

/s/Terrence M. Boyle
TERRENCE M. BOYLE

Sworn to before me this
20th day of January, 1989

/s/George Blassman
NOTARY PUBLIC

GEORGE BLASSMAN
Notary Public 02BL4761759
Albany County
Commission Expires 11/30/90

Notice of Motion for Summary Judgment (Index No. 7-89).

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

Index No. 7-89

RJI No. 0189017023

Justice: Hon. Paul E. Cheeseman

ORAL ARGUMENT REQUESTED

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rosemay Saffire, sworn to the 31st day of March, 1989 and the exhibits annexed thereto and upon the summons and complaint herein and all prior pleadings and proceedings in this action, plaintiff will move this court at a special term thereof, at the Albany County Courthouse, Albany, New York on the 17th day of April, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for summary judgment pursuant to CPLR 3212 on the grounds that there no issues of fact and that plaintiff is entitled to summary judgment as a matter of law for the relief demanded in plaintiff's complaint as follows:

A. Judgment declaring:

1. That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

2. That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and

purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

3. That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

B. Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons:

1. From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

2. From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

3. From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

C. Judgment for the costs and disbursements of this action and

D. Judgment for such other and further relief as to the court may seem just and proper.

This is an action for declaratory judgment and a permanent injunction.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR §2214(b) answering affidavits, if any, shall be served at least seven (7) days prior to the return date of this motion.

PLEASE TAKE FURTHER NOTICE, that the plaintiff hereby demands oral argument with respect to this motion.

Dated: Buffalo, New York
March 31, 1989

Yours, etc.,

KAVINOKY & COOK
Attorneys for Plaintiff
120 Delaware Avenue
Buffalo, New York 14202
(716) 845-6000

To: The Hon. Robert Abrams
Attorney General of the
State of New York
(Attn: Richard Freshour, Esq.)
The Capitol
Albany, NY 12224

Notice of Motion for Summary Judgment (Index No. 8-89) dated April 24, 1989.

STATE OF NEW YORK

SUPREME COURT : COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031

Plaintiff,

vs.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK State Campus, Albany, New York 12227

Defendant.

Index Number: 8-89
RJI Number: 0189017022
Assigned Justice: Paul E. Cheeseman

ORAL ARGUMENT REQUESTED

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ELIAS H. ATTEA, JR., sworn to the 24th day of April, 1989, and the exhibits annexed thereto and upon the summons and complaint herein and all prior pleadings and proceedings in this action, plaintiff will move this court at a

special term thereof, at the Albany County Courthouse, Albany, New York, on the 15th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for summary judgment pursuant to CPLR 3212 on the grounds that there are no issues of fact and that plaintiff is entitled to summary judgment as a matter of law for the relief demand in plaintiff's complaint as follows:

A. Judgment declaring:

1. That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

2. That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

3. That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the terri-

torial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulations, are null and void and of no force and effect.

B. Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons:

1. From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

2. From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

3. From otherwise enforceing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

C. Judgment for the costs and disbursements of this action and

D. Judgment for such other and further relief as to the Court may deem just and proper.

This is an action for declaratory judgment and a permanent injunction.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR §2214(b) answering affidavits, if any, shall be served at least seven (7) days prior to the return date of this motion.

PLEASE TAKE FURTHER NOTICE, that the plaintiff hereby demands oral argument with respect to this motion.

Dated: Buffalo, New York
April 24, 1989

Yours, etc.,

WILIAMS, STEVENS, MCCARVILLE
& FRIZZELL, P.C.
ATTORNEYS FOR PLAINTIFF
1920 LIBERTY BUILDING
BUFFALO, NEW YORK 14202
(716) 856-2112

TO: Robert Abrams, Attorney General
of the State of New York
Richard J. Freshour, Esq.
Assistant Attorney General
Attorney for Defendants
The Capitol
Albany, New York 12224

Notice of Cross-Motion for Summary Judgment.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC.

Plaintiff,

-against-

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 7-89
RJI No. 0189 017023
Assigned Justice: Cheeseman
ORAL ARGUMENT IS REQUESTED

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Jamie Woodward, sworn to the 18th day of May, 1989, and William F. Collins, sworn to the 19th day of May, 1989, submitted in opposition to plaintiff's motion for summary judgment and in support of this cross-motion for summary judgment, and upon all the prior pleadings and proceedings had in this action, defendants will move this Court at an individual assignment term thereof to be held at the Albany County Courthouse, in the City of Albany, New York on the 30th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for judgment denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, pursuant to CPLR 2215 and 3212 on the grounds that there are no issues of fact and that defendants are entitled to summary judgment as a matter of law declaring that the regulations of defendants under attack herein are lawful in all respects and should be upheld in all respects.

Dated: Albany, New York
May 19, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: JOSEPH ZDARSKY, ESQ.
Kavinoky & Cook
120 Delaware Avenue
Buffalo, NY 14202

Notice of Cross-Motion for Summary Judgment (Index No. 8-89) dated May 19, 1989.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031

Plaintiff,

-against-

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 8-89
RJI No. 0189 017022
Assigned Justice: Cheeseman
ORAL ARGUMENT IS REQUESTED

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Jamie Woodward, sworn to the 18th day of May, 1989, and William F. Collins, sworn to the 19th day of May, 1989, submitted in opposition to plaintiff's motion for summary judgment and in support of this cross-motion for summary judgment, and upon all the prior pleadings and proceedings had in this action, defendants will move this Court at an individual assignment term thereof to be held at the Albany County Courthouse, in the city of Albany, New York on the 30th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for judgment denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, pursuant to CPLR 2215 and 3212 on the grounds that there are no issues of fact and that defendants are entitled to summary judgment as a matter of law declaring that the regulations of defendants under attack herein are lawful in all respects and should be upheld in all respects.

Dated: Albany, New York
May 19, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: TIMOTHY M. O'MARA, ESQ.
Williams, Stevens, McCarville
& Frizzell, P.C.
1920 Liberty Building
Buffalo, NY 14202

No. 93-377

(7)

FILED
DEC 14 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

ROBERT ABRAMS
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Albany, NY 12224
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Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
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Dated: December 14, 1993

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(3565—1993)

14 ep

Question Presented

Whether, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes from Indian retailers, the State of New York may require the retailers' cigarette suppliers to comply with regulations limiting the quantity of tax exempt cigarettes which can be purchased for resale at reservation outlets to an amount no greater than the maximum legitimate Indian consumption of the reservation and imposing upon the suppliers minimal burdens relating to record keeping and reporting.

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No. 93-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Respondents.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals was rendered on June 10, 1993. The opinion is reported at 81 NY2d 417 (1993). It is reprinted at pages A3-A12 of the Appendix to the Printed Petition for Certiorari ("A____"; references to the Joint Appendix are cited as "JA____").

The opinion of the Appellate Division was rendered on July 9, 1992, and is reported at 181 AD2d 210 (3d Dept 1992). It is set forth at A13-A16.

The order of this Court granting petitioners' petition for a writ of certiorari and vacating the judgment of the Appellate Division, Third Department and remanding the case to the Appellate Division for further consideration in light of *Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 (1991), was entered on January 21, 1992. The order is reported at ____ US ____, 117 L Ed 2d 99, 112 S Ct 926 (1992). It is set forth at A17-A18.

The original opinion of the Appellate Division, Third Department was rendered on December 6, 1990. The opinion is reported at 164 AD2d 300 (3d Dept 1990). It is set forth at A19-A24.[1]

[1]The original order of the Appellate Division is set forth at A25-A27.

The opinion of the Supreme Court, Albany County, was rendered on June 5, 1989. The opinion is not reported. It is set forth at A28-A32.[2]

Jurisdiction

The order of the Court of Appeals was entered on June 10, 1993. By order filed November 1, 1993, this Court granted petitioners' petition for a writ of certiorari to review the order and opinion of the New York Court of Appeals. This Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

Statutory and Regulatory Provisions Involved

25 USC §§ 261-264; New York Tax Law §§ 471, 474, 481, 1814, 1846, 1847; 20 NYCRR §§ 335.6 and 335.7. These provisions are set forth in pertinent part in the appendix to this brief.[3]

Statement of the Case

A. Facts and Procedural Background

These cases involve questions of whether and to what extent federal law permits States to impose incidental burdens on Indian traders to prevent the avoidance of tax by

[2]The order and judgment of the Supreme Court, Albany County, is set forth at A33-A43.

[3]Effective December 19, 1990, 20 NYCRR 335.6 and 335.7, the regulations at issue, were renumbered 20 NYCRR 336.6 and 336.7 without any substantive change. In order to maintain consistency with the opinions rendered by the New York State courts, we will continue to employ the old numbering.

non-Indian purchasers of retail goods, here cigarettes, from retailers on Indian reservations. Respondent Milhelm Attea & Bros., Inc. ("Milhelm") is a licensed New York State cigarette tax agent and wholesale dealer of cigarettes (New York Tax Law §§ 470[6] & [9], 472, 480), a portion of whose business involves the wholesale sale of cigarettes to retailers on various Indian reservations in New York. Respondent Elias H. Attea, Jr. ("Elias") is also in the business of selling cigarettes at wholesale on Indian reservations but is not licensed as either a cigarette tax agent or wholesale dealer of cigarettes.

In December, 1988 Milhelm and Elias brought independent actions in the Supreme Court, Albany County seeking declaratory and permanent injunctive relief to enjoin the application to their businesses of certain regulations adopted by the Commissioner of Taxation and Finance in August, 1988. The regulations were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations located in New York State. It was the respondents' contention that they were federal Indian traders and that insofar as the new regulations imposed burdens upon their dealings with their Indian customers, the regulations were preempted by the Indian trader statutes. 25 USC § 261 *et seq*.

The challenged regulations are substantially similar to regulations adopted by the Commissioner of Taxation and Finance effective November 30, 1988 dealing with the sale and distribution of motor fuel in New York. In *State Tax Commission of the State of New York v Herzog Bros. Trucking, Inc.*, 487 US 1212 (1988), this Court granted a petition for certiorari filed on behalf of the State Tax Commission and vacated and remanded to the New York Court of Appeals

for further consideration, in light of the then proposed motor fuel regulations, a judgment of the Court of Appeals holding that the State's "pass on and collect" motor fuel tax scheme could not be applied to motor fuel distributors selling motor fuel at wholesale to Indian retailers because the Indian trader statutes, 25 USC § 261 *et seq*., preempted the field of regulating trade with Indians. *Herzog Bros. Trucking, Inc. v State Tax Commission*, 69 NY2d 536 (1987).

Following remand, the Court of Appeals adhered to its original decision. 72 NY2d 720 (1988). Because the regulations only applied to sales of motor fuel made after January 1, 1989, and it appeared that the Herzog Brothers, Inc. would not continue to sell to Indians after that date, the court declined to consider the validity of the new regulations. The court correctly observed in this regard that to do so under the circumstances "would constitute an advisory opinion involving hypothetical future transactions of unknown parties". 72 NY2d at 725. The court did opine that "[i]n the absence of a reversal by the Supreme Court, we assume that our interpretation of those decisions [referring to *Central Machinery Co. v Arizona Tax Commn*., 448 US 160 (1980), and *Warren Trading Post Co. v Arizona Tax Commn*., 380 US 685 (1965)] and our application of them to the facts before us represents the present state of the law on the subject". 72 NY2d at 724-725.

On January 18, 1989, the Supreme Court, Albany County, granted a preliminary injunction as requested by the respondents. Petitioners served their answers on January 20, 1989, and each side thereafter moved for summary judgment. The Supreme Court (Cheeseman, J.) rendered its decision on June 5, 1989. Based on the authority of the Court of Appeals' decision in *Herzog Brothers Trucking*,

supra, which the court found indistinguishable, the Supreme Court granted respondents' motions for summary judgment declaring the challenged regulations invalid with respect to their sales of cigarettes to Indians on Indian reservations in New York and denied in all respects petitioners' motion to dismiss or, in the alternative, for summary judgment (A28-A32). The court's order and judgment was entered on August 22, 1989.

Petitioners appealed, and by a unanimous decision dated December 6, 1990, the Appellate Division, Third Department affirmed (A19-A24). In the opinion of the Appellate Division the issues presented were similar to those considered by the New York Court of Appeals in *Herzog Brothers Trucking*, *supra*, by which the Appellate Division deemed itself to be bound. The court said in relevant part, "[a]ccordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the Court of Appeals' interpretation of the applicable Supreme Court decisions" (A24).

Petitioners thereafter filed an appeal as of right to the New York Court of Appeals pursuant to New York CPLR 5601(b)(l). By an order dated May 9, 1991, the Court of Appeals dismissed petitioners' appeal *sua sponte*, upon the ground that no substantial constitutional question was directly involved. Petitioners' subsequent motion for leave to appeal to the Court of Appeals was denied without opinion by an order of the Court of Appeals entered on September 12, 1991.

On November 25, 1991, the petitioners filed a petition for a writ of certiorari. The basis upon which the writ was sought was that this Court's decision in *Oklahoma Tax*

Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 US 505 (1991), which was decided by the Court some two months after the Appellate Division rendered its original decision, made clear that this Court intended its decisions in *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), and *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), to be read as affirming the right of the States, notwithstanding the Indian trader laws, to exercise some regulatory authority over Indian traders as an aid to the enforcement of their tax laws. On January 21, 1992, this Court granted petitioners' petition for a writ of certiorari, vacated the Appellate Division's prior order and remanded the case to the Appellate Division for further consideration in light of *Potawatomi* (A17-A18).

On July 9, 1992 the Appellate Division rendered its decision on remand (A13-A16). The Appellate Division observed that while the precise issue of federal preemption presented in this case was not directly before this Court in *Potawatomi*, this Court nevertheless had explicitly addressed the issue in response to a concern by the State of Oklahoma that because of the Indian Tribe's sovereign immunity it would be unable to enforce its tax scheme to collect sales tax from non-Indians doing business at tribal stores. The Appellate Division quoted from this Court's opinion in *Potawatomi* the observation that "under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores". 498 US at 514. From this the court concluded that this Court was of the view that not all burdens placed on Indian traders by States attempting to enforce tax schemes aimed at taxing

sales by Indian retailers to non-Indians made on reservations was impermissible (A15). The court then said (A15-A16):

> "The Supreme Court's observations call into question the continued validity of the legal analysis underpinning the Court of Appeals' decision in *Herzog Bros. Trucking* v *State Tax Commn.* (69 NY2d 536, *vacated* 487 US 1212) and again considered by that court upon remand from the Supreme Court and which opinion was the legal underpinning for our holding in this matter (164 AD2d 300, *supra*).
>
> "We now hold that minimal burdens such as are prescribed by the tax scheme promulgated pursuant to 20 NYCRR 335.5 upon Indian traders in collecting sales taxes on sales by Indian retailers to non-Indian purchasers made on Indian reservations are not barred by Federal preemption of the field of regulating trade with Indians (*see*, 25 USC 261 *et seq*)."

The Appellate Division accordingly reversed the order and judgment of the Supreme Court, denied plaintiffs' motions for summary judgment, granted defendants' cross-motions for summary judgment and declared that the challenged regulations had not been shown to be unconstitutional. Respondents thereafter appealed.

By a decision rendered on June 10, 1993, the Court of Appeals reversed (A3-A12). The Court of Appeals held that the challenged regulations imposed obligations upon wholesale Indian traders and were therefore preempted by

federal law (A7-A8). The Court of Appeals read this Court's direction in *Potawatomi* that "States may of course collect the sales tax from cigarette wholesalers * * * by assessing wholesalers who supplied unstamped cigarettes to the tribal stores", 498 US at 514, as "indicat[ing] that the method might somehow be used to retroactively collect taxes unpaid on past sales" (A11). However, the court declined to read the quoted language as establishing the right of States to impose even minimal regulatory burdens on wholesalers supplying Indian retailers as an aid to enforcement of valid State tax laws (A10). The court said in this regard (A10):

> "* * * we do not interpret the Supreme Court's statement [in *Potawatomi*] as altering the established rule stated in *Warren Trading Post Co. v Arizona Tax Commn* (*supra*, 380 US at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them. The [quoted] language cites none of the relevant decisions in this area and, as interpreted by [petitioners], is contrary to the present state of the law on the subject."

As an alternative holding, the Court of Appeals ruled that to the extent this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders" (A11), the tax regulations at issue were barred by federal preemption because in the court's view they imposed "significant" burdens on the wholesalers (A11).

B. The Tax Scheme

Section 471(1) of the New York Tax Law imposes a tax on all cigarettes possessed in this State except where the cigarettes "are sold under such circumstances that this state is without power to impose such tax". The law presumes that all cigarettes within the State are subject to tax until the contrary is established and places upon the possessor the burden of proving nontaxability. The ultimate incidence and liability for the tax is upon the consumer. Tax Law § 471(2).

Payment of the cigarette tax in New York is effected through the use of stamps which are purchased and affixed to packages of unstamped cigarettes by registered stamping agents licensed by the Department of Taxation and Finance. The cigarettes are brought into the State untaxed, and the agents, by purchasing and affixing the stamps to the unstamped packages, make payment of the tax in advance of the products' first sale in New York. Thereafter, the tax is added and collected as a part of the selling price of the cigarettes by each of the entities effecting subsequent sales until it is ultimately added to the retail price and is borne by the consumer. The law provides civil and criminal penalties for the unlawful possession of untaxed cigarettes in the State, Tax Law §§ 481, 1814, 1846, 1847, and details the kinds of records which must be maintained by persons who "possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state". Tax Law § 474.

The regulations which implement the cigarette tax, and which are challenged in these actions, were adopted by the Commissioner of Taxation and Finance on August 29, 1988 and became fully effective on January 1, 1989. The regulations are designed to prevent the loss of an estimated $65 million in cigarette taxes annually by preventing the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets.[4] Broadly, the regulations create a mechanism whereby retail dealers of cigarettes on qualified Indian reservations are permitted to purchase a sufficient quantity of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time ensuring that if they wish to make sales of cigarettes to non-Indians they have available taxed and stamped product for that purpose. Only reservation retailers who have registered with the Department of Taxation and Finance are permitted to purchase or sell at retail unstamped cigarettes and then only in an amount which is no greater than the maximum legitimate Indian consumption of the reservation on which they are located. 20 NYCRR §§ 335.6 and 335.7. No limit is imposed upon the amount of stamped product which a retail dealer may purchase and sell.

The only portions of the regulations which impose any burdens upon the retailers' cigarette suppliers are 20

[4]As we stated in the petition for certiorari (p 12 n 5), this estimate, which is substantially higher than the estimate used in earlier phases of this litigation, is the result of a study undertaken in early 1993 by the Department of Taxation and Finance's Office of Tax Policy Analysis. In conducting the study the Office of Tax Policy Analysis contacted and obtained information from cigarette agents and suppliers doing business both in and out of New York State. The estimate is based upon the figures supplied. However, because not all of the suppliers contacted cooperated in the study, the actual amount of tax revenue lost to the State is almost certainly higher. It is also estimated that the State loses approximately $35 million in taxes annually because of reservation sales of motor fuel to non-Indians.

NYCRR §§ 335.6(f) and (g) and 335.7(b), (c) and (d).[5] Section 335.6(f) and (g) requires that suppliers making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations request a copy of the dealers' tax exemption certificate and keep the copy as a means of substantiating the fact that the sale was a valid tax-free transaction. The regulation also requires that suppliers keep accurate records and maintain written evidence of their sales. Section 335.7(b), (c) and (d) provides that prior to each sale and delivery of cigarettes to a qualified Indian reservation the supplier must obtain approval from either the Indian nation or tribe or from the Department of Taxation and Finance regarding the quantity of product which may be delivered and sold without prepayment and collection of the tax.

As described in Notice N-88-53 (JA44a-JA50a), which was sent by the Department of Taxation and Finance to all licensed cigarette agents in this State, as well as to all registered motor fuel and diesel fuel distributors, the preapproval requirements of 20 NYCRR § 335.7(b), (c) and (d) are intended to be satisfied by means of a coupon system whereby each month registered dealers will be sent "Tax Exemption Coupons" by the Department of Taxation and Finance entitling them to receive a predetermined quantity of tax free product. At the time of delivery, the dealer is to complete the tax exemption coupon and submit two copies

[5]Section 335.6(c) does not now have any impact upon cigarette suppliers but could if the Commissioner of Taxation and Finance were to authorize the use of special stamps to identify packages of cigarettes intended for nontaxable sale to qualified Indians. If the use of such stamps is authorized, suppliers who are also cigarette tax agents would bear the minimal burden of affixing the special stamps to those packages of cigarettes intended for sale to qualified Indians.

to the supplier. The supplier keeps one of the copies and within five days forwards the other one to the Department of Taxation and Finance. The amount of tax free product delivered may not exceed the preprinted amount authorized by the coupon. Thus, the focus and principal burden of the regulatory scheme lies with and falls upon the Indian nation or tribe and the reservation retailer. The only burden imposed upon the supplier is a minimal one relating to recordkeeping and reporting.

Summary of Argument

I. The holding of the Court of Appeals that the Indian trader statutes bar the State from imposing minimal burdens on Indian traders to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers is in direct conflict with the decisions of this Court affirming the right of the States to do so. Because the regulations at issue in this case do not target the wholesalers or the tribes or their members for payment of any tax, but properly seek only to require the wholesalers' cooperation in preventing the avoidance of tax by the retailers' non-Indian customers, the regulations should not have been held by the Court of Appeals to be barred by the Indian trader statutes.

II. The Court of Appeals' alternative holding, that the challenged regulations are impermissible because they place "signinificant" burdens on wholesalers, is incorrect. The challenged regulations require only that cigarette distributors keep accurate records of their sales and limit their sales of tax free cigarettes to an amount no greater than the maximum legitimate Indian consumption of the reservation. This Court's relevant decisions make clear that such minimal burdens are permissible.

ARGUMENT

POINT I

The Court of Appeals erred in holding that the challenged regulations are barred by federal preemption.

The conclusion of the Court of Appeals that the Indian trader statutes bar the State from imposing minimal burdens on Indian traders to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers is founded upon a misreading and misapplication of this Court's decisions in *Moe v Confederated Salish and Kootenai Tribes*, 425 US 463 (1976), *Washington v Confederated Tribes of Colville Reservation*, 447 US 134 (1980), and *Oklahoma Tax Comm'n. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 (1991), the case which this Court required the Appellate Division to consider on remand. In those cases this Court made plain that States are free to impose minimal burdens on Indian traders to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers. Nevertheless, the Court of Appeals, citing to its own decision in *Herzog Brothers Trucking*, where the court had held that the preemptive effect of the Indian trader statutes, 25 USC § 261 *et seq.*, was such as to preclude the State from imposing *any* burden on Indian traders, no matter how minimal, ruled that the challenged tax scheme was invalid because it imposed obligations on Indian traders. The Court of Appeals' holding is in direct conflict with the decisions of this Court cited above and should be reversed.

In *Moe*, this Court upheld the right of the State of Montana to require Indian tribal sellers of cigarettes to collect a

state sales tax imposed upon non-Indian purchasers of cigarettes. The tax scheme, which in this respect is similar to that of New York, required the seller to pay the tax to the wholesaler and then add it to the purchase price of the cigarettes for payment by the ultimate consumer. *See, Confederated Salish and Kootenai Tribes v Moe*, 392 F Supp 1297, 1308 (D Mont 1975).

In approving the Montana law, this Court emphasized the fact that the cigarette tax had been validly imposed and observed that without the expedient of having the retailer collect the tax from the non-Indian purchasers "wholesale violations of the law by the latter class will go virtually unchecked". 425 US at 483. The Court distinguished *Warren Trading Post Co. v Arizona Tax Commission*, 380 US 685 (1965), which the court below cited as controlling, on the ground that the tax in that case, a gross income tax imposed on the on-reservation sales by a trader to reservation Indians, had been imposed directly on the seller and could, therefore, have put additional financial burdens on the trader or the Indians with whom it dealt. 380 US at 691. This, the Court held, "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations". *Id.* In contrast, the collection requirement of the Montana law was characterized by the Court as "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax". 425 US at 483. The quoted language, from *Warren Trading Post Co.*, was held not to apply. 425 US at 482.

Moe expressly left open the question of whether the "minimal burden" approved with respect to Indian retailers

could similarly be imposed upon the Indians' distributors, one step further back in the chain of distribution. *See*, 425 US at 468 n 6. However, the conclusion that it can becomes manifest when *Moe* is read in conjunction with *Colville*, which this Court decided four years later.

In *Colville*, this Court upheld the right of the State of Washington to impose minimal regulatory burdens on the operators of tribal smokeshops in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes at the smokeshops. Quite significantly, although the operators of the smokeshops were federally licensed Indian traders, *see*, *Confederated Tribes of Colville v State of Washington*, 446 F Supp 1339, 1347 (ED Wash 1978), and thus subject to the Indian trader laws, this Court nevertheless upheld the right of the State of Washington to compel the operators to comply with the State's cigarette tax laws, which required them to purchase and affix tax stamps to packages of cigarettes intended for sale to non-Indians, and also required them to keep detailed records of their taxable and nontaxable sales. In ruling as it did, this Court made clear that federal Indian law, including the Indian trader statutes, did not preempt the Washington State tax scheme. The Court said, 447 US at 155:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Equally significant is the further holding of the Court that the State of Washington had the power to seize shipments of

unstamped cigarettes traveling to the reservation from out-of-state wholesalers even though the sales by the wholesalers to the tribal businesses were concededly exempt from State taxation and no State tax was due while the cigarettes were in transit. 447 US at 161-162. This holding is in sharp contrast to the conclusion of the Court of Appeals, both here and in *Herzog Brothers Trucking*, that the Indian trader laws in and of themselves place every transaction between an Indian tribe and its supplier beyond the regulatory authority of the States.

Whatever doubts the lower court had, notwithstanding *Colville*, regarding the viability of State tax schemes which employ an Indians' supplier as an aid to enforcement should have been laid to rest when, in February, 1991, this Court decided *Potawatomi*. In that case, the Citizen Band of Potawatomi Indian Tribe (hereinafter "Tribe" or "Potawatomis") filed suit in the United States District Court for the Western District of Oklahoma to enjoin an assessment by the Oklahoma Tax Commission seeking $2.7 million for taxes on cigarette sales occurring between 1982 and 1986 at a convenience store owned and operated by the Tribe on land held in trust for it by the Federal Government. Among other questions before this Court was whether the Potawatomis' sovereign immunity prevented the Tribe from being liable for the collection of State taxes on the sale of cigarettes to nonmembers of the Tribe.

Citing to *Colville* and *Moe*, this Court answered this question in the negative, observing that "[a]lthough the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes". 498 US at 512. Of signal importance to

the issue raised here, however, is that in response to Oklahoma's complaint that the Tribe's sovereign immunity would prevent it from enforcing its right to tribal assistance guaranteed by such cases as *Moe* and *Colville*, the Court stated that the State could, under its decision, secure collection of the taxes by pursuing the Indians' wholesalers. The Court said, 498 US at 514:

> "In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, Colville, supra*, [447 US] at 161-162, *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v Oklahoma Tax Comm'n*, 898 F. 2d 122 (CAlO 1990). * * *". Emphasis added.

The Court of Appeals, based upon its earlier analysis in *Herzog Brothers Trucking*, read this passage narrowly. The court stated that while the remedies discussed "might somehow be used to retroactively collect taxes unpaid on past due sales" (A11), *Potawatomi* did not permit the State to exercise regulatory authority over Indian traders "prospectively" to aid in the enforcement of its tax laws (A10). But the distinction drawn by the Court of Appeals is fallacious. If the Indian trader laws represent a bar to the exercise by the States of regulatory authority over Indian traders in their dealings with their Indian customers, it should not matter whether that authority is exercised prospectively or retrospectively. It seems clear to us that by instructing in *Potawatomi* that States have the right to collect sales tax from an Indian tribe's cigarette wholesaler by filing assessments against the wholesaler, this Court plainly was indicating that not all burdens placed upon Indian traders by States attempting to prevent the avoidance of tax by non-Indians doing business on Indian reservations are impermissible.

This not only makes good sense, it is sound policy. The Indian trader laws were enacted for the protection of Indian tribes in their dealings with traders. They were never intended to provide Indian retailers with a competitive advantage over their non-Indian competitors by enabling them to offer nonmembers an exemption from State taxes to which they are properly subject. Nor were they intended to stand as a barrier to the exercise by the States of their legitimate right to protect themselves against the evasion of taxes by non-Indians doing business at reservation outlets. The regulations at issue in this case are designed to overcome the vexing problem of reservation retailers failing to collect taxes due on their sales of cigarettes to their non-Indian customers. The regulations accomplish this design by limiting the quantity of tax exempt cigarettes which can be purchased for resale by the retailers to an amount no greater than the maximum legitimate Indian consumption of the reservation on which the outlet is located and imposing upon the suppliers minimal burdens relating to record keeping and reporting. Under the unimpeachable authority of

Moe, *Colville* and *Potawatomi*, such minimal burdens are clearly permissible.

Central Machinery Co. v Arizona Tax Commission, 448 US 160 (1980), on which the respondents will undoubtedly rely, does not lead to a different result. In *Central Machinery Co.* this Court ruled that the State of Arizona could not impose a tax against the seller of goods when the sale was made to a tribal enterprise on an Indian reservation. The tax was a "transaction privilege tax" on the privilege of doing business in the State of Arizona. 448 US at 161-162. The amount of the tax was added as a separate item to the price of goods sold and was actually borne by the tribal enterprise. The Court ruled that its decision in *Warren Trading Post Co.* was controlling and held that the Indian trader statutes preempted the asserted State tax.

Although this Court couched its decision in *Central Machinery Co.* in terms of federal preemption, it is clear that the basis of the Court's ruling was not the mere existence and breadth of the Indian trader statutes, but the underlying fact that the Arizona tax, which was characterized by the Court as being "precisely the same tax as was involved in *Warren Trading Post Co.*", 448 US at 164 n 3, actually had as its target the tribal enterprise and its supplier and could, therefore " 'disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission' ". *Id.*, quoting from *Warren Trading Post Co.*, 380 US at 691. In contrast, just 17 days earlier in *Colville*,[6] this Court let stand the Washington State tax scheme which,

[6]*Colville* was decided by this Court on June 10, 1980; *Central Machinery Co.* was decided on June 27, 1980.

while imposing regulatory burdens on federal Indian traders, did not target the traders or the tribe or its members for payment of the tax. The Court of Appeals wholly ignored this crucial distinction when it held that the regulations at issue were preempted simply because they placed an obligation upon wholesale Indian traders.

But as this Court's decisions make clear, in determining the preemptive impact of the Indian trader statutes, the critical question is not merely whether the transaction sought to be regulated is one between an Indian trader and an Indian, as the Court of Appeals mistakenly held, but whether the regulation is intended to further the important State interest of ensuring that otherwise taxable transactions are taxed. In *Central Machinery Co.*, for example, the tax at issue was aimed directly at the Indian trader, which could, and did, pass the tax along to the Tribe. 448 US at 162. In *Colville*, quite to the contrary, neither the Indian trader nor the Tribe were targeted for payment of the tax, which, as here, was due only from the Tribe's non-member customers. We submit that the formalistic and mechanical approach adopted by the Court of Appeals to the effect that State regulation of the respondents is impermissible simply because they are wholesale Indian traders represents a fundamental misunderstanding of this Court's precedents which should explicitly be corrected.

In the area of cigarette taxation, with which this case is concerned, this Court has declared in *Moe*, *Colville* and *Potawatomi*, that the interests of the States in seeking to prevent the avoidance of tax by non-Indian purchasers of cigarettes at reservation outlets far outweighs the interests of either the tribes or their distributors in avoiding the minimal burdens of recordkeeping and reporting. Simply

stated, Indian tribes do not have any governmental interest or enjoy any right to generate business at reservation outlets by marketing to nonmembers the tribe's exemption from taxation. The States do, however, have an interest in collecting taxes from their citizens in order to fund the government.

The regulations at issue in this case do not target either the wholesalers or the tribes or their members for payment of any tax, but properly seek only to require the wholesalers' cooperation in preventing the avoidance of tax by the retailers' non-Indian customers. Under the controlling authority of *Moe*, *Colville* and *Potawatomi*, we submit that federal preemption does not bar the State from enforcing the challenged regulations. The Court of Appeals should so have held.

POINT II

The Court of Appeals erred in holding that the challenged regulations place "significant" burdens on wholesalers.

The Court of Appeals' alternative holding (A11-A12), that the challenged regulations are impermissible because they place "significant" burdens on wholesalers, is similarly incorrect. As affects wholesalers, the challenged regulations are quite limited in their scope. They require no more than that cigarette distributors making tax free sales of cigarettes to wholesale or retail dealers located on Indian reservations obtain and keep a copy of the dealers' tax exemption certificate and keep accurate records and maintain written evidence of their sales (20 NYCRR 335.6[f] and

[g]), and obtain from the dealer and forward to the Department of Taxation and Finance the "Tax Exemption Coupons" through which it is contemplated that the limitations on tax exempt sales will be satisfied (*see*, pp 11-13, *supra*).[7] We submit that such minimal impositions are quite reasonable as a means of assuring that non-Indians dealing with reservation retailers do not escape their obligation to pay State taxes legitimately imposed upon them. The challenged regulations require only that wholesalers keep a record of their taxable and tax exempt sales as an adjunct of the State's unquestioned right to require the collection and remition of taxes on sales to non-Indians. Such a "burden" infringes upon no legitimate tribal interest and conflicts with no federal law.

Indeed, in *Colville*, this Court approved *in toto* Washington State's much more onerous recordkeeping requirements, which required smokeshop operators not only to record and retain for State inspection the number and dollar volume of taxable sales to nonmembers of the Tribe, but to record and retain "the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made and the dollar amount and dates of sales". 447 US at 159. Since the operators of the smokeshops in *Colville* failed to present any evidence on the question of whether the requirements of the law were overly burdensome, it was this Court's holding that the Tribes failed to meet their burden of showing that the challenged tax scheme was not reasonably necessary as a means of preventing fraudulent transactions.

[7]We note in this regard that respondent Milhelm, as a licenced New York State cigarette tax agent, already files monthly cigarette tax returns with the New York State Department of Taxation and Finance on which it reports the quantity of its sales of unstamped cigarettes within the State. *See*, Record on Appeal, pp 58, 68.

447 US at 160. Here, too, there is no evidence on the question of whether the requirements of the New York law are not reasonably necessary to prevent the avoidance of tax by non-Indians doing business at reservation outlets. Thus, the Court of Appeals was clearly in error when it ruled that the challenged regulations exceeded the limits of permissible State action established by this Court's decisions in *Potawatomi*, *Moe* and *Colville*.

Furthermore, the Court of Appeals totally mischaracterized the nature of New York's regulatory scheme by asserting that "[t]he tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservations in excess of the predetermined maximum amount and, with respect to those cigarettes, *imposes a sales tax on Indian retailers*" (A11; emphasis added). The State is not here imposing a tax upon Indian retailers.

The regulations at issue in this case were specifically designed to avoid any prepayment of tax on cigarettes sold at wholesale to tribal retailers which are intended to be resold to Indians (*see*, Affidavit in Opposition of Frank Munoz, Record on Appeal, pp 131-133; Affidavit in Opposition of William Collins, Record on Appeal, pp 252-255). They accomplish this design by authorizing tribal retailers to purchase a sufficient quantity of untaxed cigarettes to satisfy the maximum probable demand of the qualified Indian consumers of the reservation on which the tax free sale is made. 20 NYCRR 335.6 and 335.7.[8]

The amount of tax free product which may be purchased by the tribal retailers is determined in one of two ways. If

[8]*See* footnote 3, page 3, *supra*.

the Indian Tribe or Nation on whose reservation the sales take place regulates, licenses or controls the sale and distribution of cigarettes within the reservation, the Department of Taxation and Finance will determine the amount of tax free product which may be purchased by using such documentary evidence and/or statistical information relating to the probable demand on the reservation as the Tribe or Nation may submit. 20 NYCRR 335.7(d)(2)(i). If the Tribe or Nation does not regulate the sale and distribution of cigarettes within the reservation, or does not submit evidence relating to probable demand, the Department of Taxation and Finance will calculate the demand "based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe * * *". 20 NYCRR 335.7(d)(2)(ii). In either case there is absolutely no tax or precollection burden with respect to any sales of cigarettes which are purchased for resale to qualified Indian consumers.

The fact that there is a precollection requirement with respect to the retailers' sales to non-Indians does not mean that the retailers are being taxed. As this Court's decisions make clear, such a precollection requirement with respect to cigarettes intended for sale to non-Indians does not amount to taxation of Indians, but represents the legitimate assertion by the State of its long recognized authority to employ Indian Tribes and retailers, and now their suppliers, "to assist in the collection [from non-Indians] of validly imposed state sales taxes". *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma*, *supra*, 498 US at 512; *see also Washington v Confederated Tribes of Colville Reservation*, *supra*, 447 US 134; *Moe v Confederated Salish and Kootenai Tribes*, *supra*, 425 US 463, 483 (Col-

lection requirement of Montana law in *Moe*, held to be not a "tax", but "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax"). The Court of Appeals' characterization of the regulatory scheme as "impos[ing] a sales tax on Indian retailers" is clearly in error in this fundamental respect.

CONCLUSION

For the reasons stated, the order of the Court of Appeals should be reversed.

Dated: Albany, New York
December 14, 1993

Respectfully Submitted,

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APPENDIX
Statutory and Regulatory Provisions Involved.

25 USC:

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. (Aug. 15, 1876, c. 289 § 5, 19 Stat. 200.)

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.
(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066, Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so

long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein; *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

New York Tax Law:

§ 471. Imposition of cigarette tax

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale on and after June first, nineteen hundred ninety-three, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces

of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and policy statements of such an agency applicable to such sales. Such tax on cigarettes shall be the at the rate of twenty-eight cents for each ten cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be fourteen cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the tax commission so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix

stamps on such packages of cigarettes. Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps.

3. The amount of taxes advanced and paid by the agent as hereinabove provided shall be added to and collected as part of the sales price of the cigarettes.

§ 474. Records to be kept; examination

1. Every person who shall possess or transport any unstamped cigarettes upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such cigarettes. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the cigarettes transported, and the name and address of the person who has or shall assume the payment of the tax. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in cigarettes in this state and subject to the provisions of this article.

2. Every person who shall possess or transport more than two hundred fifty cigars or more than five pounds of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the

person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that such person is a dealer in tobacco products in this state and subject to the requirements of this article.

3. Every dealer or distributor or employee thereof, or other person acting on behalf of a dealer or distributor, who shall possess or transport more than fifty cigars or more than one pound of tobacco upon the public highways, roads or streets of the state, shall be required to have in his actual possession invoices or delivery tickets for such tobacco products. Such invoices or delivery tickets shall show the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products transported, and the name and address of the person who has or shall assume the payment of the tax and the wholesale price or the tax paid or payable. The absence of such invoices or delivery tickets shall be prima facie evidence that the tax imposed by this article on tobacco products has not been paid and is due and owing.

4. At the time of delivering cigarettes to any person each agent or wholesale dealer, and at the time of delivering tobacco products to any person each distributor or wholesale dealer of tobacco products, shall make a true duplicate invoice showing the date of delivery, the number of packages and number of cigarettes contained therein, in each shipment of cigarettes delivered, and the items and quantity and wholesale price of each item in each shipment of tobacco products delivered, and the name of the purchaser to whom delivery is made, and shall retain the same for a period of three years subject to the use and inspection

of the commissioner of taxation and finance. Each dealer shall procure and retain invoices showing the number of packages and number of cigarettes contained therein, in each shipment of cigarettes received by him, and the items and quantity and wholesale price of each item in each shipment of tobacco products received by him, the date thereof, and the name of the shipper, and shall retain the same for a period of three years subject to the use and inspection of the commissioner of taxation and finance. The commissioner of taxation and finance by regulation may provide that whenever cigarettes or tobacco products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner of taxation and finance a copy of the freight bill within ten days after the delivery in the state of each shipment. All dealers shall maintain and keep for a period of three years such other records of cigarettes or tobacco products received, sold or delivered within the state as may be required by the commissioner of taxation and finance. The commissioner of taxation and finance is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the stamping of cigarettes or the sale and delivery of cigarettes or tobacco products taxable under this article, as well as the stock of cigarettes or tobacco products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

(As amended L.1989, c. 61, § 79.)

§ 481. Penalties and interest

1. (a)(i)(A) An agent or distributor or other person treated as a distributor pursuant to section four hundred seventy-one-d who or which fails to file a return or to pay any tax within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure continues after the expiration of the first month after such return was required to be filed or such tax became due, not exceeding thirty per centum in the aggregate.

(B) If a tax on cigarettes or on tobacco products under this article is not paid when due by any other person, the person liable for the payment of such tax shall be subject to a penalty of fifty per centum of the amount of such tax determined to be due as provided in this article plus one per centum of such amount for each month or fraction thereof during which such failure to pay continues after the expiration of the first month after such tax became due.

(C) In the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this paragraph shall not be less than the lesser of one hundred dollars or one hundred per centum of the amount required to be shown as tax on such return. For the purpose of the preceding sentence, the amount of tax required to be shown

on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(ii) If any amount of tax is not paid on or before the last date prescribed in this article for payment, interest on such amount at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted. Interest under this subparagraph shall not be paid if the amount thereof is less than one dollar.

(iii) If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause.

(iv) If the failure to pay any tax within the time required by or pursuant to this article is due to fraud, in lieu of the penalties and interest provided for in subparagraphs (i) and (ii) of this paragraph, there shall be added to the tax (A) a penalty of fifty per centum of the amount of tax due, plus (B) interest on such unpaid tax at the underpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter for the period beginning on the last day prescribed by this article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day on which such tax is paid, plus (C) for the period beginning on the last day prescribed by this

article for the payment of such tax (determined without regard to any extension of time for paying) and ending on the day the amount of tax due is finally determined or, if earlier, on the day on which such tax is paid, an amount equal to fifty per centum of the interest payable under clause (B) of this subparagraph on that portion of the unpaid tax which is attributable to fraud.

(v) The penalties and interest provided for in this paragraph shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax. Interest under this paragraph shall be compounded daily.

(b) In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. In addition, the commissioner may impose a penalty of not more than fifty dollars for each fifty cigars or one pound of tobacco or fraction thereof in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any person and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco or fraction thereof in excess of five hundred cigars or ten pounds of tobacco in the possession or under the control of any person, with respect to which the tobacco products tax has not been paid or assumed by a distributor or tobacco products dealer; provided, however, that any such penalty imposed shall not exceed five thousand dollars in the aggregate. The commissioner may impose a penalty

of not more than fifty dollars for each fifty cigars or one pound of tobacco, or fraction thereof, in excess of fifty cigars or one pound of tobacco in the possession or under the control of any tobacco products dealer or distributor appointed by the commissioner, and a penalty of not more than one hundred dollars for each fifty cigars or pound of tobacco, or fraction thereof, in excess of two hundred fifty cigars or five pounds of tobacco in the possession or under the control of any such dealer or distributor, with respect to which the tobacco products tax has not been paid or assumed by a distributor or a tobacco products dealer; provided, however, that any such penalty imposed shall not exceed ten thousand dollars in the aggregate. Any penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The commissioner of taxation and finance, in his discretion, may remit all or part of such penalty. Such penalty shall be paid to the department of taxation and finance and disposed of as hereinafter provided with respect to moneys derived from the tax.

2. (a) The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages or more than two hundred fifty cigars or more than five pounds of tobacco by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes or tobacco products are subject to tax as provided by this article.

(b) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing tobacco products or unstamped

packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of tobacco products or unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

3. For purposes of this chapter, the certificate of the commissioner of taxation and finance to the effect that a tax or fee imposed by this article has not been paid, that a return required by or under the provisions of this article has not been filed, or that information has not been supplied, as required by or under the provisions of this article, or that a bond or other security required by or pursuant to the provisions of this article has not been filed, or that books, accounts, records, memoranda, documents or papers have not been supplied as required by or pursuant to the authority of this article, or that a retail dealer or vending machine owner or operator is not currently or validly registered as required by this article shall be prima facie evidence that such tax or fee has not been paid, such return not filed, such information not supplied, such bond or other security not filed, that such books, accounts, records, memoranda, documents or papers have not been supplied, or that such retail dealer or vending machine owner or operator is not currently or validly registered.

4. Cross-reference: For criminal penalties, see article thirty-seven of this chapter.

§1814. Cigarette and tobacco products tax

(a) Attempts to evade or defeat tax.—(1) Any person who willfully attempts in any manner to evade or defeat any tax imposed by article twenty of this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a misdemeanor.

(2) Any person who willfully attempts in any manner to evade or defeat the taxes imposed by article twenty of this chapter or payment thereof on (i) twenty thousand cigarettes or more (ii) twenty-two thousand cigars or more or (iii) four hundred forty pounds of tobacco or more or has previously been convicted two or more times of a violation of paragraph one of this subdivision shall be guilty of a class E felony.

(b) Willful failure to file a return or report, or pay tax.—Any person required under article twenty of this chapter to pay or make a return or report, who willfully fails to pay such tax or make such return or report, at the time or times so required, shall be guilty of a misdemeanor.

(c) Fraudulent returns, reports, statements or other documents.—(1) Any person who willfully makes and subscribes any return, report, statement or other document which is required to be filed with or furnished to the commissioner of taxation and finance or to any person, pursuant to article twenty of this chapter, which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor.

(2) Any person who willfully delivers or discloses to the commissioner of taxation and finance or to any person pursuant to article twenty of this chapter, any list, return, report, account, statement or other document known by him to be fraudulent or to be false as to any material matter shall be guilty of a misdemeanor.

(3) For purposes of this section, the omission by any person of any material matter with intent to deceive shall constitute the delivery or disclosure of a document known by him to be fraudulent or to be false as to any material matter.

(d) Any person, other than an agent so authorized by the tax commission, who possesses or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of article twenty of this chapter shall be guilty of a misdemeanor.

(e) Any person, other than an agent so authorized by the tax commission, who willfully possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages or who willfully sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of article twenty of this chapter shall be guilty of a class E felony.

(f) For the purposes of this section, the possession or transportation within this state by any person, other than an agent, at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. With respect to such possession or transportation any provisions of article twenty of this chapter providing for a time period during which a use tax imposed by such article may be paid on unstamped cigarettes or unlawfully or improperly stamped cigarettes or during which such cigarettes may be returned to an agent shall not apply. The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by article twenty of this chapter.

(g) Nothing in this section shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, or lawfully transporting or storing tobacco products, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of unstamped or unlawfully stamped packages of cigarettes or possession or control of tobacco products, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

(h) Any willful act or omission, other than those described in subdivision (a),(b),(c),(d),(e),(f),(g),(i) or (j) of this section, by any person which constitutes a violation of any provision of article twenty of this chapter shall constitute a misdemeanor.

(i) Any person who falsely or fraudulently makes, alters or counterfeits any stamp prescribed by the tax commission under the provisions of article twenty of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such stamp, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited stamp, or knowingly and willfully possesses any cigarettes in packages bearing any such false, altered or counterfeited stamp, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any stamp, prescribed by the tax commission under the provisions of article twenty of this chapter, or who knowingly and willfully possesses any such device, shall be guilty of a class E felony. For the purposes of this subdivision, the words "stamp prescribed by the tax commission" shall include a stamp, impression or imprint made by a metering machine, the design of which has been approved by such commission.

(j)(1) Any dealer, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than ten pounds of tobacco or more than five hundred cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance

under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter, shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(2) Any person, other than a dealer or a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control more than fifteen pounds of tobacco or more than seven hundred fifty cigars upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by the distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars or by a term of imprisonment not to exceed thirty days.

(3) Any person, other than a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, who shall knowingly transport or have in his custody, possession or under his control twenty-five hundred or more cigars or fifty or more pounds of tobacco upon which the taxes imposed by article twenty of this chapter have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance under article twenty of this chapter, or other person treated as a distributor pursuant to section four hundred seventy-one-d of this chapter shall be guilty of a misdemeanor. Provided further, that any person who has twice been convicted under this subdivision shall be guilty of a class E felony for any

subsequent violation of this section, regardless of the amount of tobacco products involved in such violation.

(4) For purposes of this subdivision, such person shall knowingly transport or have in his custody, possession or under his control tobacco or cigars on which such taxes have not been assumed or paid by a distributor appointed by the commissioner of taxation and finance where such person has knowledge of the requirement of the tax on tobacco products and, where to his knowledge, such taxes have not been assumed or paid on such tobacco products by a distributor appointed by the commissioner of taxation and finance.

(k) Any person who falsely or fraudulently makes, alters or counterfeits a registration certificate or sticker required under the provisions of section four hundred eighty-a of this chapter, or causes or procures to be falsely or fraudulently made, altered or counterfeited any such registration certificate or sticker, or knowingly and willfully utters, purchases, passes or tenders as true any such false, altered or counterfeited registration certificate or sticker, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any registration certificate or sticker required under the provisions of such section, or who knowingly and willfully possesses any such device, shall be guilty of a class B misdemeanor.

New York Tax Law:

§1846. Seizure and forfeiture of cigarettes

(a) Whenever a police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four of section 2.10 of such law, acting pursuant to his special duties, shall discover any cigarettes subject to tax provided by article twenty of this chapter, and upon which the tax has not been paid or the stamps not affixed as required by such article, they are hereby authorized and empowered forthwith to seize and take possession of such cigarettes, together with any vending machine or receptacle in which they are held for sale. Such cigarettes, vending machine or receptacle seized by a police officer or such peace officer shall be turned over to the tax commission. Such seized cigarettes, vending machine or receptacle, not including money contained in such vending machine or receptacle, shall be forfeited to the state. The tax commission may, within a reasonable time thereafter, upon publication of a notice to such effect for at least five successive days, before the day of sale, in a newspaper published or circulated in the county where the seizure was made, sell such forfeited cigarettes and vending machines or receptacles at public sale and pay the proceeds into the state treasury to the credit of the general fund. Cigarettes so seized and sold shall be sold only to an agent under article twenty of this chapter and the notice of sale shall contain a provision to this effect. Notwithstanding any other provision of this section, the tax commission may enter into an agreement with any city of this state which is authorized to impose a tax similar to that imposed by article twenty of this chapter to provide for the disposition between the state and any such city of the proceeds from any such sale.

* * *

§1847. Seizure and forfeiture of vehicles or other means of transportation used to transport or for deposit or concealment of cigarettes

(a) Any peace officer designated in subdivision four of section 2.10 of the criminal procedure law, acting pursuant to his special duties, or any police officer designated in section 1.20 of the criminal procedure law may seize any vehicle or other means of transportation used to transport or for the deposit or concealment of more than one hundred unstamped or unlawfully stamped packages of cigarettes subject to tax under article twenty of this chapter, other than a vehicle or other means of transportation used by any person as a common carrier in transaction of business as such common carrier and such vehicle or other means of transportation shall be subject to forfeiture as hereinafter in this section provided.

* * *

20 NYCRR:

335.6 Indian nations or tribes, qualified Indian consumers and registered dealers. [Tax Law §§ 471, 471-a and 475](a) As provided for in this section and section 335.7 of this Part, exempt Indian nations or tribes, qualified Indian consumers and registered dealers (as defined herein) may purchase, on qualified reservations, cigarettes upon which the seller has not prepaid and precollected the cigarette tax imposed pursuant to article 20 of the Tax Law.

(b) (1) (i) *Qualified Indian* for purposes of this section means a person, duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(ii) *Qualified Indian consumer* for purposes of this section means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for such Indian's own use or consumption (i.e. other than for resale) within such reservation.

(2) *Exempt Indian nation or tribe* for purposes of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(3) *Qualified reservation* for purposes of this section means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(4) *Registered dealer* for purposes of this section means:

(i) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on a qualified reservation; or

(ii) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who:

(a) registers with the Department of Taxation and Finance; and

(b) makes or intends to make qualified sales of cigarettes on qualified reservations.

(5) *Qualified sale* for purposes of this section means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

(c) Although stamps are usually affixed to packages of cigarettes as evidence of payment of tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sales to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a

registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped packages of cigarettes are deemed to be unstamped packages of cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamps may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped packages of cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(d) *Exempt Indian nations or tribes.* (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for its own use or consumption, or for making qualified sales, provided that the nation or tribe:

(i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance;

(ii) takes delivery of the cigarettes on its qualified reservation; and

(iii) uses, or intends to use, such cigarettes for its own official use or consumption within such reservation, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the In-

dian nation's or tribe's exempt organization number referred to in section 529.9(b) of this Title.

(3) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(e) *Qualified Indian consumers.* (1) a qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual:

(i) takes delivery of the cigarettes on a qualified reservation; and

(ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(f) *Registered dealers.* (1) Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to such applicant, if the applicant:

(i) (*a*) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or

(*b*) is a qualified Indian, who is also a wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii) (*a*) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant; and

(*b*) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and

(iii) (*a*) provides evidence to the department that such applicant has complied (or will comply) with any applicable tribal regulations and/or licensing procedures; and

(*b*) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax. No fee is charged for this registration.

(3) A registered dealer may purchase cigarettes upon which the seller has no prepaid and precollected the cigarette tax for purposes of making qualified sales, provided that the registered dealer:

(i) has received from the department a valid certificate of registration as a dealer of cigarettes;

(ii) takes delivery of such cigarettes within the boundaries of its qualified reservation; and

(iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of article 20 of the Tax Law, or any rule or regulation pursuant to such article, may result in the cancellation or suspension of the registration as a dealer of cigarettes.

(g) (1) The exemption certificates prescribed in subdivision (d), (e) and (f) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by

the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. In addition, such evidence of each exempt transaction must be retained by the seller and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating copies of these individual bills, invoices, receipts and other forms of written evidence of exemption from tax with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax return.

Historical Note
Sec. filed Oct. 17, 1989 eff. Nov. 7, 1989.

335.7 Qualified sales of cigarettes on qualified reservations. [Tax Law, §§471, 471-a, 475 and 481(2)]

(a) (1) The cigarette tax imposed pursuant to article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such cigarettes are ultimately purchased on such reservation by a qualified Indian for such Indian's own personal use or consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax since the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation, regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer, are subject to a state's cigarette excise tax.

(b) (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and

precollected for purposes of making qualified sales, if that agent—with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe—sells and delivers such cigarettes to:

(i) an exempt Indian nation or tribe;

(ii) a registered dealer; or

(iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette agent (and its employees) may possess cigarettes for sale in this State and transport such cigarettes onto a qualified reservation located in this State without prepaying and precollecting the cigarette tax. However, as provided in section 335.6 of this Part, subsequent qualified sales may be made solely on such qualified reservations. Properly completed exemption certificates must be received by all sellers of cigarettes, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval for delivery from that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval for delivery from the department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) (1) If applicable, departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(2) In determining such probable demand, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified

Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the Federal Bureau of Indian Affairs).

(3) In determining such trade territory, the department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(4) In addition, the department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage

of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(5) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to subparagraphs (2)(ii) and (3)(ii) of this subdivision.

(6) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.6 of this Part. The possession within this State at any one time of more than 400 cigarettes in unstamped (or unlawfully stamped) packages by any Indian nation or tribe, qualified Indian consumer or registered dealer, except as provided herein, shall be presumptive evidence that such cigarettes are subject to tax. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes.

Historical Note

Sec. filed Oct. 17, 1989 eff. Nov. 7, 1989.

CORRECTED COPY

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No. 93-377

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

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JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

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QUESTION PRESENTED

Does the Supreme Court decision in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), holding that Congress by enacting the Indian trader statutes occupied the field of regulating trade with Indians, preclude states from imposing tax and regulatory burdens upon sales at wholesale of cigarettes to Indians on Indian reservations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Respondent Milhelm Attea & Bros., Inc. respectfully states that it has no corporate parents, subsidiaries or affiliates. The "also known as" designations in the caption of this case are listed as a result of typographical errors contained in documents issued by, or submitted to, one or more of the petitioners.

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IN THE

Supreme Court of the United States

October Term, 1993

No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

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JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

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ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

25 U.S.C. §§261-264; New York Tax Law §§471, 474, 481, 1814, 1846, New York Tax Law §1847; and 20 NYCRR §335.6 and 20 NYCRR §335.7 are set forth as Appendix I to the petition for certiorari and as an Appendix to the petitioners' brief. In addition, 25 C.F.R. Part 140 (1993); New York Tax Law §472, subd. 1; and 20 NYCRR §331 and §332 are involved. Relevant portions of those statutory and regulatory provisions are set out in the appendix to this brief.

STATEMENT OF THE CASE

A. Introduction

The narrow issue presented in this case is whether the Court should continue to follow the well-settled rule established in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) that the federal Indian trader statutes, 25 U.S.C. §§261-264, pre-empt all state taxation and regulation of sales of goods to Indians on Indian reservations. While this Court has permitted some state taxing authority on sales by Indians to *non-Indians* on the reservation, it has never permitted states to tax or regulate sales of goods *to Indians* on reservations because Congress has pre-empted that field.

The respondents sell cigarettes at wholesale to Indians on reservations. They challenged regulations enacted by New York tax administrators which, *inter alia*, restrict the wholesale sale of cigarettes by Indian traders to Indians on reservations and impose state cigarette taxes on all such sales except as to certain limited quantities of cigarettes approved by the State. Following *Warren Trading Post*, the New York Court of Appeals unanimously struck down the regulations, holding that they were pre-empted by the Indian trader statutes. The Court of Appeals rejected the petitioners' contention that decisions of this Court permitting states to require Indian retailers to collect taxes from non-Indian retail customers may be read as authority for regulating reservation sales to Indians.

B. Respondents

Respondents Milhelm Attea & Bros., Inc. ("Milhelm") and Elias H. Attea, Jr. ("Elias") (collectively the "Atteas") hold licenses from the United States Department of the Interior, Bureau of Indian Affairs ("BIA"), authorizing them to sell cigarettes on various Indian Reservations within the State of New York (R 339-43).[1] The BIA issued the licenses under the federal Indian trader laws. 25 U.S.C. §§261-264. Under the authority of their licenses, the Atteas sell cigarettes at wholesale to Indians on Indian reservations located in New York State. All of the Atteas' sales on the reservation are to Indians. They make no retail sales. *Milhelm Attea & Bros. v. Department of Taxation and Finance of the State of New York*, 81 N.Y.2d 417, 423, 599 N.Y.S.2d 510, 615 N.E.2d 994 (1993) (A6).

Milhelm also makes some of its total sales off the reservations, and is therefore licensed as a cigarette tax agent and a wholesale dealer under New York Tax Law. *Milhelm Attea & Bros. v. Department of Taxation and Finance of the State of New York*, 164 A.D.2d 300, 301 (3d Dept. 1990) (A21). Milhelm's off-reservation sales are not at issue in this case. Elias makes no off-reservation sales and is not licensed as either a cigarette agent or a wholesale dealer under New York law (A30).

C. The Tax Law

Under New York Tax Law §471[1], a tax is imposed on all cigarettes "possessed in the state by any person for sale" except that no tax is imposed "on cigarettes sold under such circumstances that [the] state is without

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[1] References to the Appendix to the Petition for Certiorari are cited as "A____"; references to the Joint Appendix are cited as "JA____"; references to the statutory appendix to this Brief are cited as "RA____"; references to the Record are cited as "R____".

power to impose such tax" (A45). The tax is "intended to be imposed upon only one sale of the same package of cigarettes." New York Tax Law §471[1] (A46).

The tax is paid through purchases of stamps by agents registered by the petitioner New York Department of Taxation and Finance ("Department" or "State"), which stamps must be affixed to cigarette packages to be sold within the state. New York Tax Law §471[2] (A46). The tax must be advanced and paid by the agent, who is liable for the collection and payment of the tax imposed under Section 471 on cigarettes possessed in the state for sale (*Id.*). The taxes advanced and paid by the agent must be added to and collected "as part of the sales price of the cigarettes." New York Tax Law §§471[2] and [3] (A46).

The law prescribes both civil and criminal penalties for failure to pay the tax, and also provides for the seizure and forfeiture of unstamped cigarettes. New York Tax Law §§481, 1814, 1846 (A50-A62).

Prior to August 1988, the Department, which administers the cigarette tax, made no attempt to collect the tax on cigarettes sold on Indian reservations to Indians by wholesalers, including sales by the Atteas, although the Department knew of such sales. Milhelm, as a cigarette tax agent, has filed monthly tax returns with the Department since 1984 reporting the quantities of unstamped cigarettes it sold on Indian reservations (R 58).

D. The Regulations at Issue

On August 29, 1988 the Department adopted the cigarette tax regulations at issue in this case (A62-A74; JA 27a-41a). The regulations, which became effective

January 1, 1989, place numerous limitations on sales by wholesalers such as the Atteas to Indians on Indian reservations.

1. **The regulations impose state cigarette taxes on all sales to Indians on reservations except as to limited quantities of cigarettes determined by the State.** Under the regulations, untaxed cigarettes may only be sold and delivered on a reservation to an "exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that [the seller] complies with the applicable provisions of [the regulations] with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter." 20 NYCRR §335.7(b)(3) (A71). The regulations further provide that Indian tribes, Indian consumers or Indian dealers who purchase cigarettes "under any other circumstances must prepay or pay, as the case may be, the cigarette tax at the time of purchase by remitting the tax to the seller as part of the purchase price of the cigarettes." 20 NYCRR §335.7(e) (A74). The Department issued Notice N-88-53 to wholesalers concerning a coupon system used to administer reservation sales of cigarettes, stating:

> If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you *must collect all* applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so you will be held liable for the tax due.

(JA 44a-45a) (emphasis original).

2. **The regulations limit who may sell at wholesale on the reservations.** Only cigarette agents licensed by the State may sell to Indian tribes or to "registered dealers" on the reservations (JA 44a) 20 NYCRR §§335.7(b)(2), (3)

(A71).[2] This provision, in turn, subjects wholesalers selling to Indians on reservations to the entire state scheme regulating cigarette agents including license fees totalling $3,000.[3]

3. The regulations limit the number of untaxed cigarettes which may be sold on the reservations by setting absolute limits on the quantities which may be sold. The quantities approved by the Department are based upon "evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation . . . or registered dealer." 20 NYCRR §335.7(d) (A72-A74). The Department calculates "the probable

[2] The notice sent by the Department to the Atteas and other wholesalers stated "only . . . licensed cigarette agents may sell tax-free products either to an Indian nation or to a registered dealer . . ." (JA 44a). The regulations themselves provide that "registered dealers" may also sell to other "registered dealers," 20 NYCRR §335.6(f)(2) (A67), but only cigarette agents may import cigarettes onto the reservations, 20 NYCRR 335.7(b)(2) (A71), and only retailers (Indian or non-Indian) and Indian wholesalers (but not non-Indian wholesalers) may qualify as "registered dealers." 20 NYCRR §335.6(b)(4) (A63).

[3] The fee for a cigarette agent's license is $1,500. New York Tax Law §472(1) (RA1). Cigarette agents who are also wholesalers must also obtain a license as a wholesale dealer, 20 NYCRR §331.1(e)(2) (RA7), which also requires an application fee of $1,500. 20 NYCRR §332.1(b)(1) (RA9). Cigarette agents and wholesalers may be required to renew their licenses (and pay a new fee) every three years. 20 NYCRR §§331.1(b)(4)(c)(2) (RA 6-7). The cigarette agent must post a performance bond in the amount of $1,000, or other acceptable security. 20 NYCRR §§331.2(b), 331.3(a) (RA7, RA8). The agent must have commitments from at least two manufacturers whose aggregate share of the New York State cigarette market is at least 40 percent as to the quantity of cigarettes they will sell him, and "must maintain a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting its business." 20 NYCRR §331.1(a)(2)(i) (RA5-RA6).

demand of qualified Indian consumers" based on the New York average consumption of cigarettes per capita, multiplied by the number of enrolled tribal members (or, if unavailable, the reservation service area population as compiled by the BIA). 20 NYCRR §335.7(d)(2)(ii) (A73). There is an alternative procedure to determine demand based on consultation with a tribe which regulates cigarette sales on its reservation, 20 NYCRR §335.7(d)(2)(i) (A72-A73), but this provision has not been used (R 244).

4. The regulations provide for State determination of the cigarette demand for the trade territory of each tribe and each registered dealer. 20 NYCRR §335.7(d) (A72-A74). The Department determines each trade territory "based upon the information at its disposal," unless a tribe regulates cigarette sales on its reservation, in which case the Department will "consult" with the tribe regarding trade territories on its reservation before it makes its determination. 20 NYCRR §335.7(d)(3) (A73). In calculating demand within a registered dealer's trade area, the Department will consider evidence submitted by a registered dealer. 20 NYCRR §335.7(d)(4) (A73-A74).

5. The regulations require prior approval by the Department of each wholesale sale. The cigarette agent "must obtain approval for delivery from the Department regarding the amount of cigarettes to be sold and delivered without prepayment and precollection of the tax, prior to each such sale and delivery of any such cigarettes on such reservation." 20 NYCRR §335.7(c)(2) (A72). There is an alternative provision for similar preapproval by the relevant tribe instead of the Department, but only if the tribe agrees with the Department to limit the sale of untaxed cigarettes on its reservation to "an agreed upon amount," which no tribe

has done. 20 NYCRR §335.7(c)(1) (A72). If the agent sells cigarettes in excess of the approved amount, he is liable for the tax on the excess amount. 20 NYCRR §335.7(e) (A74; JA 45a).

6. **The regulations limit who may purchase untaxed cigarettes at wholesale.** Such sales may only be made to "registered dealers" and certain tribes. A "registered dealer" is either a retail dealer or an Indian wholesaler (more precisely, a wholesaler who is a member of a New York tribe) who is registered with the Department. 20 NYCRR §335.6(b)(4) (A63-A64). A tribe must obtain an "exempt organization certificate" from the Department in order to purchase untaxed cigarettes. 20 NYCRR §335.6(d)(1) (A65). The registered dealer or tribe may lose its authority to purchase untaxed cigarettes if it does not comply with all requirements imposed by the Department. 20 NYCRR §335.6(d)(3) and (f)(5) (A66).

7. **Tax Exemption Coupons issued by the State must accompany each sale.** The Department's Notice N-88-53 stated:

> Each month registered dealers will receive "Tax Exemption Coupons" for "Registered Dealers" from the Tax Department entitling them to make purchases of motor fuel, diesel motor fuel and/or cigarettes on which the applicable prepaid excise and sales taxes have not been passed through.
>
> To purchase tax-free product from you, the registered dealer must complete the tax exemption coupon, submit the Department copy (white) and the Distributor/Agent copy (pink) to you and keep the Dealer copy (yellow). The registered dealers must submit the tax exemption coupon to you before or at the time of delivery of the product.
>
> You must keep the Distributor/Agent copy (pink) for your records and submit the Department copy (white) within 5 days of delivery of the tax-free product to the Audit Division/FACCTS—Indian Matters at the address on page 4.
>
> You may sell tax-free product *only* to the registered dealer named on the coupon and deliver the product *only* to the locations specified on the coupon. In addition, the amount of tax-free product sold may *not* exceed the preprinted amount authorized by the coupon. If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you *must collect all* applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so, you will be held liable for the tax due.

(JA 44a-45a) (emphasis in original).

8. **The regulations impose additional administrative requirements on wholesalers.** Wholesalers must segregate taxed and untaxed product, must distinguish between taxed and untaxed cigarettes on every bill, invoice, receipt or other sales record, must retain exemption certificates from the purchasers, and must report all sales of untaxed product to the Department (JA 45a), 20 NYCRR §335.6(g) (A68-A69).

9. **The regulations also impose additional limitations on subsequent retail sales of untaxed cigarettes.** Retailers can only sell to tribal members who produce tax exemption certificates from the Department. 20 NYCRR §335.6(e)(2) (A66). The retailer must keep detailed records of each exempt sale. 20 NYCRR §335.6(g) (A68-A69). Untaxed cigarettes may be purchased at retail only for the purchaser's own use and only on the reservation where purchased. 20 NYCRR §335.6(e)(1)(ii) (A66).

E. Proceedings Below

In December 1988, prior to the effective date of the regulations, Milhelm and Elias commenced separate actions in the New York State Supreme Court, Albany County, claiming that the regulations, to the extent they impose additional state burdens on the Atteas' wholesale sales of cigarettes to Indians on Indian reservations, were pre-empted by the Indian trader statutes, 25 U.S.C. §§261-264, and the Indian Commerce Clause, United States Constitution, Art. 1, Sec. 8, cl.3 (JA 11a-41a, 51a-65a). The Atteas named as defendants the petitioners herein. They sought judgment declaring the regulations unconstitutional and injunctions restraining the State from enforcing the regulations or otherwise regulating or imposing state taxes in connection with their wholesale sales of cigarettes to Indians on Indian reservations (JA 19a-24a; 59a-64a).

In a joint order and judgment entered on August 22, 1989, the trial court granted summary judgment permanently enjoining application of the Department's cigarette tax scheme to the Atteas' wholesale sales to Indians on Indian reservations (A33-A43).

In its initial decision in this case, the Appellate Division, Third Judicial Department, unanimously affirmed the trial court. 164 A.D.2d 300, 564 N.Y.S.2d 491 (3d Dept. 1990) (A19-A24).

The New York Court of Appeals dismissed, *sua sponte*, the State's attempt to appeal as of right from the Appellate Division's affirmance, 77 N.Y.2d 989, 571 N.Y.S.2d 994, 575 N.E.2d 400 (1991), and denied the State's subsequent motion for leave to appeal to the Court of Appeals. 78 N.Y.2d 858, 575 N.Y.S.2d 454, 580 N.E.2d 1057 (1991).

On January 21, 1992, this Court granted the State's initial certiorari petition, and entered a summary reconsideration order vacating and remanding the case to the Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)." 112 S.Ct. 926 (1992) (A17-A18).

On remand, the Appellate Division reversed itself and upheld the regulations. 181 A.D.2d 210 (3d Dept. 1992) (A13). Although the court noted that the federal pre-emption issue presented by the instant case was not before the Supreme Court in *Potawatomi* (A13-A16), it determined from this Court's *dictum* in *Potawatomi* concerning state collection of taxes from wholesalers that "the Supreme Court is of the view that not all burdens placed upon Indian traders" are impermissible (A15).

On June 10, 1993, the New York Court of Appeals unanimously reversed the Appellate Division and struck down the regulations, holding that they were pre-empted by the federal Indian trader statutes. 81 N.Y.2d 417, 599 N.Y.S.2d 510, 615 N.E.2d 944 (1993) (A3). The court reasoned that the Indian trader statutes pre-empted the field of regulation of traders, and that the regulations imposed significant burdens on the wholesalers' trade with Indian retailers.

The Court of Appeals quoted from *Warren Trading Post*, where this Court held " '[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so firmly in hand that no room remains for state laws imposing additional burdens upon traders.' " 81 N.Y.2d at 424 (A7) (quoting 380 U.S. at 690).

The Court of Appeals rejected the State's argument that "minimal burdens" could be placed on Indian traders to collect a tax ultimately borne by non-Indian consumers. *Id.* at 424-425 (A7-A8). The court reasoned that there was a "significant difference" between placing minimal burdens on Indian retailers selling to non-Indians, as allowed by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and placing such burdens on reservation sales by wholesalers to Indians. 81 N.Y.2d at 425 (A8).

The Court of Appeals held that the respondents' wholesale sales of cigarettes were squarely covered by the Indian trader laws and regulations and, thus, state taxation and regulation of such sales were pre-empted under *Warren Trading Post*. Subsequent sales of cigarettes by Indian retailers to non-Indians are not covered by the Indian trader statutes and regulations. " 'The Indian trader statutes, 25 U.S.C. §261 *et seq.* incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange. . ., *but no similar intent is evident with respect to sales by Indians to non-members of the Tribe*' " 81 N.Y.2d at 424-25 (quoting *Colville*, 447 U.S. at 155-56) (emphasis by the Court of Appeals). This distinction is critical and served as the cornerstone of the opinion of the Court of Appeals.

The Court of Appeals rejected the State's argument that this Court's decision in *Potawatomi*, 498 U.S. 505 (1991), allows "minimal burdens" to be placed on wholesalers. 81 N.Y.2d at 425 (A9). The court noted that *Potawatomi* involved the doctrine of tribal sovereign

immunity rather than pre-emption under the Indian trader statutes. *Id.* (A9). Addressing the *dictum* in *Potawatomi* that States may collect the sales tax from wholesalers by off-reservation seizures or by assessments, the court believed that the statement did not alter "the established rule stated in *Warren Trading Post Co. v. Arizona Tax Commission, supra*, (380 U.S. at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them." 81 N.Y.2d at 426 (A10). The Court of Appeals noted that *Potawatomi* did not address the relevant decisions in this area, and that court did not read *Potawatomi* "as altering the established law regarding federal pre-emption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers." *Id.* at 427 (A11).[4]

The Court of Appeals further held that even if this Court's decisions in *Moe*, *Colville*, and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, the tax regulations were nonetheless barred by federal pre-emption because they imposed "significant" burdens on the wholesalers' trade with Indians by dictating the number of unstamped cigarettes the wholesalers may sell to reservation Indians, by directing with whom the wholesalers may trade and, to the extent the wholesalers had to prepay taxes on all cigarettes delivered on the

[4] The Court of Appeals also referred to its prior decision in *Herzog Bros. Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536, 545-46, 516 N.Y.S.2d 179, 508 N.E.2d 914 (1987), *vacated and remanded*, 487 U.S. 1212, *adhered to on remand*, 72 N.Y.2d 720, 536 N.Y.S.2d 416, 533 N.E.2d 914 (1988), where it held that state taxation and regulation of motor fuel sales by an Indian trader to Indian retailers on reservations were pre-empted by the federal Indian trader laws, citing *Warren Trading Post*, 81 N.Y.2d at 423, 424 (A6, A7).

reservation in excess of the predetermined maximum amount approved by the Department, by imposing a tax on the sales to the Indian retailers. *Id.* (A11). The court found that the regulations therefore impinged on the federal interest of comprehensively regulating trade with the Indians, and on the authority of the Commissioner of Indian Affairs to determine " 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' " *Id.* (A11-A12) (quoting 25 U.S.C. §261).

SUMMARY OF ARGUMENT

1. The Constitution grants Congress the "Power . . . to regulate Commerce with the Indian Tribes." Article 1, Section 8, Clause 3. By enacting the Indian trader statutes, 25 U.S.C. §§261-264 (A44-A45), Congress has comprehensively regulated trade with reservation Indians. Extensive regulations have been promulgated under such statutes. 25 C.F.R. Part 140 (RA11-RA23).

This Court held in *Warren Trading Post* that such comprehensive federal regulatory scheme totally pre-empted all state laws regulating sales to Indians on reservations. The Court held that such federal regulation was so comprehensive "that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. In *Central Machinery Company v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court reaffirmed that "Congress has pre-empted the field" with respect to regulating sales of goods to Indians on reservations. *Id.* at 165.

The State cigarette tax regulations clearly regulate transactions covered by the Indian trader laws and regulations. Rather than constituting mere "record keeping", the State's regulations affect quantities,

prices, sale locations, sales documentation, who can make sales and to whom they can sell, and impose a tax on the wholesale sale of cigarettes to Indians on reservations. In the case at bar, the New York Court of Appeals, following *Warren Trading Post*, properly held that the State's regulations were pre-empted by federal law. 81 N.Y.2d 417, 422, 425-27 (A4, A9-A10).

The Court's decisions in *Moe* and *Colville* involved collection by an Indian retailer of a valid tax imposed on a non-Indian retail customer. Tax and regulatory burdens upon a sale by an independent wholesaler to Indians on reservations were not at issue. Federal pre-emption was not implicated in such cases, since the Indian trader laws pertain only to sales to Indians, not sales to non-Indians. *Colville*, 447 U.S. at 155-56. *Central Machinery*, which reaffirmed *Warren Trading Post*, was decided after *Moe* and *Colville*. Hence, *Moe* and *Colville* do not constitute authority for altering the established rule set forth in *Warren Trading Post*.

The Court's decision in *Potawatomi* restated that *Moe* and *Colville* "stand for the proposition that the doctrine of tribal sovereign immunity does not prevent a state from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe." 498 U.S. at 513. The decision in *Potawatomi* was based on the doctrine of sovereign immunity, and federal pre-emption was not at issue. Therefore, the Court of Appeals properly held that the Court's decision in *Potawatomi* did not alter the established rule set forth in *Warren Trading Post*, that the Indian trader statutes pre-empt all state laws pertaining to sales to Indians on reservations. 81 N.Y.2d at 425-26 (A9-A11).

As stated in *Central Machinery*, "[u]ntil Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language . . .'." 448 U.S. at 166. Although Congress has had over 25 years to change the decision in *Warren Trading Post* if it disagreed with it, Congress has not chosen to do so. The State's arguments based on "policy" should be addressed to Congress, not this Court. In addition, the State has other alternatives to regulating where state action is pre-empted, including entering into tax collection agreements with Indian tribes, or developing a constitutionally permissible system for collecting taxes at the retail level, consistent with *Moe*, *Colville* and *Potawatomi*.

2. The Indian trader statutes grant the Commissioner of Indian Affairs "the sole power" to appoint Indian traders and to regulate all aspects of sales to Indians, including specifically quantity and price. 25 U.S.C. §261 (A44). The challenged regulations encroach on the Commissioner's authority by regulating quantity, price, who can make sales and to whom they can sell. Thus, the State's regulations also are pre-empted because they impinge upon matters expressly covered by federal law.

3. Because New York's Tax Law requires that the cigarette tax be added to and collected as part of the sale price of the cigarettes upon a sale by a wholesaler to an Indian retailer, enforcement of the regulations at issue as part of the State's collection process would violate the long standing principle that Indians are immune from state taxation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171 (1973). Indeed, the New York Court of Appeals found that the regulations impose "a sales tax on Indian retailers." 81 N.Y.2d at 427 (A11).

The decision of the New York Court of Appeals should be affirmed.

ARGUMENT

POINT I

THE STATE CANNOT TAX OR REGULATE INDIAN TRADERS' SALES OF CIGARETTES TO INDIANS BECAUSE CONGRESS HAS PRE-EMPTED THE FIELD OF REGULATING SALES OF GOODS TO INDIANS ON RESERVATIONS.

A. This Court has held that the Indian Trader Statutes Pre-empt State Laws Imposing Additional Burdens on Traders.

1. *The Indian Trader Statutes.*

Since enactment of the original Indian trader statutes in 1790, Act of July 22, 1790, Ch. 33, 1 Stat. 137, Congress has comprehensively regulated trade with Indians and the licensing of those who sell goods to Indians on reservations. The original Indian trader statutes, as well as all succeeding laws, were enacted under the Indian Commerce Clause of the Constitution, Art. I, Section 8, cl. 3, which granted Congress the "Power . . . to regulate Commerce with the Indian Tribes." Under the Indian Commerce Clause, "Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).[5]

Existing law provides:

> The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper

[5] This Court noted in *Oneida* that the national government's lack of exclusive power over trade with the Indians was viewed as a key deficiency of the Articles of Confederation, and led to adoption of the Indian Commerce Clause. 470 U.S. at 234 n.4.

> specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

Act of Aug. 15, 1876, ch. 289, §5, 19 Stat. 200, 25 U.S.C. §261 (A44) (emphasis added).

A person wishing to trade with the Indians is "permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe," once he has established "to the satisfaction of the Commissioner . . . that he is a proper person to engage in such trade." Act of Mar. 3, 1901, Ch. 832, §1, 31 Stat. 1066, as amended by the Act. of Mar. 3, 1903, Ch. 994, §10, 32 Stat. 1009, 25 U.S.C. §262 (A44). Trade may be prohibited by the President, Act of June 30, 1834, Ch. 161, §3, 4 Stat. 729, 25 U.S.C. §263 (A44-A45), and there are penalties for trading without a license. Act of July 31, 1882, Ch. 360, 22 Stat. 179, 25 U.S.C. §264 (A45).

Pursuant to this statutory authority, the Commissioner of Indian Affairs[6] has promulgated comprehensive regulations governing the licensing and conduct of Indian traders. 25 CFR §§140.1-140.26 (1993) (RA11-RA23). An applicant for an Indian trader's license must submit detailed information regarding where it proposes to carry on trade, financing, business experience, and the persons the applicant intends to employ. Both the applicant and employees must provide detailed references. 25 CFR §140.9(a) (RA18-RA19). Tobacco sales to Indians under 18 years of age are prohibited. 25 CFR §140.16 (RA21). Gambling and drug

[6] All functions of the Commissioner of Indian Affairs have been transferred to the Secretary of the Interior. Reorg. Plan No. 3 of 1950, §§1, 2, 64 Stat. 1262, set out in 5 U.S.C.A. App. at 231 (1967). Because the relevant statutes and regulations continue to refer to the Commissioner, however, we refer to the Commissioner throughout this brief.

sales on licensed premises are prohibited. 25 CFR §§140.19, 140.21 (RA22). The trader's prices are reviewable by federal officials and must be fair and reasonable; the trader's books are subject to inspection; merchandise must be of good quality; and credit practices are restricted. 25 CFR §§140.22, 140.23, 140.24 (RA22-RA23). The President may prohibit the introduction of goods to any tribe altogether, if he finds the public interest so requires. 25 CFR §140.2 (RA12).

2. *Warren Trading Post and Central Machinery.*

In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court struck down the imposition of Arizona's gross proceeds tax on an Indian trader. The Court held that by enacting the Indian trader statutes, Congress has pre-empted the field of regulating trade with Indians on reservations. The Court observed that the statutes were "comprehensive" and the regulations promulgated thereunder were "apparently all-inclusive", and concluded that the Indian trader statutes and regulations "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.* at 690.

The Court's unanimous opinion in *Warren Trading Post* traced the federal government's "sweeping and dominant control over persons who wished to trade with Indians and Indian tribes" from the "very first days of our Government," "by the first Congress," and "in the very first volume of the federal statutes."[7] *Id.* at 687-88. The Court found that "such comprehensive federal regulation of Indian traders has continued from that day

[7] Act of July 22, 1790, 1 Stat. 137.

to this" and described how the detailed regulations promulgated by the Commissioner of Indian Affairs prescribed "in the most minute fashion" the federal requirements imposed on Indian traders. *Id.* at 689.

After reviewing the federal interest in regulating trade with Indians, the Indians' freedom to run their affairs without state control, and the absence of any state responsibility in Indian matters, the Court in *Warren Trading Post* concluded:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 691. Thus the Court held that Indian traders are "immune" from state taxes upon their sales to Indians. 380 U.S. at 691 n. 18. The Court in *Warren Trading Post* also noted that the Solicitor's Office of the Department of Interior had twice interpreted the federal Indian trader statutes to bar States from taxing federally licensed Indian traders on their sales to reservation Indians, and that those rulings were correct. 380 U.S. at 690 (citing 57 I.D. 124 (1940); 58 I.D. 562 (1943)).

The Court reaffirmed *Warren Trading Post* in *Central Machinery Company v. Arizona Tax Comm'n*, 448 U.S. 160 (1980). In that case, the Court held that federal regulation of Indian traders was so comprehensive that

States lacked authority to tax an on-reservation sale by an Indian trader to a tribe even though the trader was unlicensed and did not maintain a place of business on the reservation. "It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165. The Court held that Congress had " 'undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.' " 448 U.S. at 166, quoting *Warren Trading Post*, 380 U.S. 685, 691 n. 18.

The decisions in these cases make it clear that the key inquiry determinative of federal pre-emption in this area is whether the state is taxing or regulating a transaction which is governed by the Indian trader statutes. "[S]ince the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax." *Central Machinery*, 448 U.S. at 165. It is not significant whether the economic impact of the tax is borne only by the Indian, or only by the trader. The tax was barred in *Warren Trading Post* because it imposed a financial burden "on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed." 380 U.S. at 691.[8]

The Indian trader statutes and regulations have broad application. First, the Indian trader statutes by their terms are not limited to retail or consumer transactions. Indeed, the reference in Section 262 to "any person desiring to trade", and the references in Sections 263 and 264 to the "introduction of goods" and "introduc[ing] goods" to a reservation or Indian country, clearly encompass the wholesale distribution of goods. In fact,

[8] *See also Central Machinery*, 448 U.S. at 164 n.3 (regardless of the label placed upon a tax, "its imposition as to on-reservation sales to Indians" is pre-empted).

Central Machinery concerned a *commercial* transaction with reservation Indians involving the on-reservation sale of 11 tractors to an Indian farming enterprise. 448 U.S. at 161. The Court there rejected a narrow interpretation of the scope of the Indian trader laws and regulations, reasoning that such a narrow construction could lead to circumvention of the federal policy to be protected. 448 U.S. at 165.

Second, the history of the Indian trader statutes reflects a broad and all-inclusive application to all aspects of trade with Indians. When those statutes were adopted, it was understood that under the Indian Commerce Clause and federal laws and treaties, "all intercourse with [the Indians] shall be carried on exclusively by the government of the union," or persons under its authority. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), cited in *Warren Trading Post*, 380 U.S. at 688. In *Williams v. Lee*, 358 U.S. 217 (1959), the Court recognized that the Indian trader statutes were enacted in reliance on the proposition that states have no regulatory powers on reservations:

> Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes, it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a department of Indian affairs.

358 U.S. at 220. Thus, reading the Indian trader laws "in light of the common notions of the day and the assumptions of those who drafted" them, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1975), leads to the conclusion that Congress' purpose was to regulate fully this area, the precise conclusion reached by this Court in *Warren Trading Post*.

Because this Court has determined in *Warren Trading Post* that Congress occupied the field of regulating Indian traders' sales to Indians on reservations, the pre-emptive effect of the Indian trader laws and regulations is not limited to situations where state laws are in direct conflict with the federal regulatory scheme. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1982) (absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found, *inter alia*, from a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."); *Fidelity Federal Savings & Loan Assoc. v. De la Cuesta*, 458 U.S. 141, 153 (1982). *Warren Trading Post* stated that "state laws imposing *additional* [not *conflicting*] burdens upon traders . . ." were not permitted. 380 U.S. at 690 (emphasis added). Of course, where Congress has pre-empted the field, the state cannot enter it—whether or not its action would actually conflict with a federal law. *See, e.g., Pacific Gas & Elec. Co.*, 461 U.S. at 213-14; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

3. ***The Instant Case.***

The Atteas' wholesale sales to Indians on reservations are clearly governed by the Indian trader statutes and regulations. As parties introducing goods onto Indian reservations, the Atteas must comply with federal licensing requirements. 25 U.S.C. §264. They are subject to the regulatory authority of the Commissioner of Indian Affairs as persons "desiring to trade with the Indians on an Indian reservation." 25 U.S.C. §262. Similarly, their sales to Indians come within the Commissioner's "sole power and authority" to make

regulations "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. §261. Indeed, the State has never contended that the Atteas' sales and deliveries to Indians on reservations are not within the scope of such federal regulation.

The state tax law and regulations at issue herein directly burden transactions governed by the federal regulatory scheme. They impose a state tax upon all wholesale sales by the Atteas to Indians on reservations except as to certain limited quantities of cigarettes determined by the State, and require that the Indian trader add that tax to the sales price of the cigarettes and collect the tax from the Indians as part of the price. New York Tax Law §471[1], [3] (A45-A47), 20 NYCRR §§335.6(f); 335.7(b)(3)(c) and (d) (A67, A71-A74). The regulations also comprehensively regulate such transactions by limiting the Atteas to selling untaxed cigarettes only to certain persons or entities, such as Indians who have registered with the State as "Registered Dealers." 20 NYCRR §§335.6(b)(4) and (f); 335.7(b)(1) (A62-A63, A66-A67, A71). The regulations control the location on the reservation where such sales may be made, the sales documentation to be used, the records to be kept by both the Indian trader and the Indians, and the quantities of unstamped cigarettes which may be sold to reservation Indians by the Indian trader. 20 NYCRR §335.7 (A70-A74).

These regulations impose a liability on both parties to the wholesale transaction, increase the trader's financial exposure when selling to Indians on open account, increase the capital requirements of Indian wholesale purchasers by increasing the cost of goods purchased, interfere with the trader's customer relationships, and

create additional record keeping expense, among other burdens. Thus, additional state requirements are imposed in areas specifically covered in minute detail by the federal Indian trader statutes and regulations.

The contention that the regulations constitute "off-reservation compliance", as *amici* argue, is simply inaccurate. By definition, the regulations pertain to sales *on* reservations (20 NYCRR §§335.7) (A70), and the judgment below is limited to the Atteas' sales to Indians on reservations (A34-A43).

The Court of Appeals correctly held that such state tax regulations were pre-empted because they regulate transactions in an area reserved exclusively to the federal government. Accordingly, the judgment below should be affirmed.

B. The decisions relied on by petitioners do not support the imposition of additional burdens on traders by the State.

To avoid the clear proscription of *Warren Trading Post* and *Central Machinery* against state regulation of sales to Indians, the State argues that the Court's decisions regarding regulation of reservation retail sales by Indians to non-Indian customers in *Moe v. Confederated Salish and Kootenai Tribe*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980), have been extended by *dictum* in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), to allow state taxation and regulation of sales at wholesale by Indian traders to Indians on reservations. The State's reliance on such cases is misplaced.

1. ***Moe and Colville distinguish between sales by traders to Indians, which are comprehensively regulated by the Indian trader laws, and sales to non-Indians, which are not so regulated, and allow minimal burdens only on sales to non-Indians.***

Moe and *Colville* are cases of limited application. They do not stand for the proposition that states may intrude upon all aspects of Indian trade in order to "prevent avoidance of tax by non-Indian purchasers of goods from Indian retailers." (Pet. Br. at 14). Those cases also did not involve "the viability of state tax schemes which employ an Indians' [*sic*] supplier as an aid to enforcement." (Pet. Br. at 17).

At issue in *Moe* and *Colville* was the imposition of state regulatory burdens at the retail level upon retailers who were selling to non-Indians. The Court approved state requirements that retailers *collect* taxes from non-Indian retail customers, because the tax was imposed on the non-Indian retail customer, and mere collection of the tax from the non-Indian retail customer did not offend considerations of tribal sovereignty or violate any federal law. *Moe*, 425 U.S. at 483; *Colville*, 447 U.S. at 155-57. The Indian trader statutes were inapplicable to such retail sales to non-Indians.

In *Moe*, the tribal retailers argued that under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 175 (1973), the State could not impose its cigarette tax on retail sales to non-Indians nor require the tribe to assist the state by collecting such taxes at the time of the retail sale to the non-Indian customer. 425 U.S. at 481-82. The tribe contended that such requirements constituted "gross interference with [its] freedom from state regulation." *Id.* at 482. The Court held that,

to the extent that the Indian retailers sell to non-Indian retail customers on whom the state has imposed a valid tax, "the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid in the State's collection and enforcement thereof." *Id.* at 483. The Court distinguished *Warren Trading Post* as a decision concerning burdens imposed upon "Indian traders for trading with Indians on reservations," *id.* at 482, and thus inapplicable to a sale to a non-Indian. The Court also held that the requirement that the Indian retailer add the tax to the sales price and collect it did not violate *McClanahan* or *Mescalero* because it was "not, strictly speaking, a tax at all" upon the Indian. 425 U.S. at 483.

In *Colville*, the Court held that Indian retailers could be required to assist the State in collecting taxes from non-Indian retail customers by purchasing from the State a quantity of tax stamps and affixing such stamps to individual packages of cigarettes at the time of retail sale of such cigarettes to non-members of the tribe. 447 U.S. at 159. The Court rejected the contention that the burden of collection imposed on the retail transaction with a non-Indian was pre-empted by federal law, holding expressly that there was a distinction between a sale to an Indian and a sale to a non-Indian:

> The Indian trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, *see, Warren Trading Post Co.* . . ., but no similar intent is evident with respect to sales by Indians to non-members of the Tribe.

447 U.S. at 155-56.

In *Moe* and *Colville*, the state requirements were completely independent of the wholesale transactions between the Indian vendor and his supplier. Critical to each decision was the fact that the specific transactions at issue were sales to non-Indians, and thus the Indian trader statutes were not implicated. Therefore, neither case is authority for state regulation of sales like those at issue in this case—namely, sales at wholesale by Indian traders to Indians.

Neither *Moe* nor *Colville* approved a requirement that Indian vendors prepay state taxes to their wholesale suppliers. Contrary to the State's assertion (Pet. Br. at 15), neither the Court nor the district court passed on or endorsed the application of the pre-payment provisions of the Montana tax statute in *Moe*. 425 U.S. at 468, n.6. The Court's holding expressly stopped short of such a requirement. *Id.* The only "collection requirement" of the Montana law approved by the Court was at the retail level, on sales to non-Indians.

In *Colville*, the Court explained that regulation was limited to retail sales to non-Indians in part because under the Constitution and Washington's tax law there could be no taxable event until the cigarettes were sold to a non-Indian purchaser:

> Essentially the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales made by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses or distributes the products. Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser. Hence, as the district court concluded, the tax falls on that purchaser. We accept that conclusion.

Colville, 447 U.S. at 142, n.9.

The State argues that *Moe* and *Colville* authorize general "burdens on Indian traders", justifying the regulations at issue herein (Pet. Br. at 14). But those cases did not permit imposition of state burdens upon Indian traders acting within the scope of the Indian trader statutes. The retailers in *Colville* were tribes (who are not required to have Indian trader's licenses[9]) and Indians, who were licensed traders and who sold to Indians as well as non-Indians. However, insofar as they were selling to non-Indian retail purchasers, their status as licensed Indian traders was immaterial and purely incidental. The key to the *Colville* decision was that the retail sales to non-Indians were not regulated by the Indian trader statutes. *Colville*, 447 U.S. at 155-56. Similarly, the record keeping obligations imposed on the retailers, as part of the state's regulation of retail sales to non-Indians, only concerned preliminary determination of the retail customer's status.

Also, the off-reservation seizure of untaxed cigarettes enroute to the reservations which was approved in *Colville* does not constitute authority for states imposing "burdens on Indian traders." In *Colville*, the cigarettes which were seized had already been purchased off the reservation by the tribes.[10] The seizure of the tribes'

[9] Only "persons" must obtain an Indian trader's license. 25 U.S.C. §262 (A44).

[10] *See*, Pretrial Order entered in the District Court in *Colville* (R. at 158) which provided the stipulated facts and respective contentions of the parties where the State of Washington contended as follows:

(Footnote continued on following page.)

cigarettes off the reservation was approved as part of the regulation of the retail transactions because the tribes "refused to fulfill collection and remittance obligations [upon them] which the state has validly imposed." 447 U.S. at 161-62. Thus, a reservation sale within the scope of the Indian trader statutes and regulations was not at issue. Moreover, the Court stated "[i]t is significant that these seizures took place outside the reservation in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries." *Id.* at 162.

That *Moe* and *Colville* did not in any way limit or overrule this Court's holding in *Warren Trading Post* is evident by this Court's treatment of *Warren Trading Post* in cases decided after *Moe* and *Colville*. Just two weeks after deciding *Colville*, the Court issued its decisions in *Central Machinery* and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Central Machinery*, the Court confirmed its finding in *Warren Trading Post* that Congress had occupied the field of regulatory sales to Indians by Indian traders. 448 U.S. at 165. In *Bracker*, the Court held that the federal scheme regulating Indian owned timber was so comprehensive that "like in *Warren Trading Post* . . . [it] leaves no room for the additional burdens imposed by state law." *Id.* at 151 n.15.

(Footnote continued from preceding page.)

> 5.5 Washington may classify as "contraband" unstamped cigarettes *owned by the tribe* and intended for ultimate resale by tribally licensed retailers to non-members of the tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiffs Indian reservations or are in transit in interstate commerce to plaintiffs' Indian reservations from points outside the state (emphasis supplied).

2. Potawatomi did not limit or overrule Warren Trading Post.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the issue was whether tribal sovereign immunity could be compromised by permitting states to directly assess taxes and bring suit against a tribe because the tribe failed to collect and remit state cigarette excise taxes on reservation retail sales to non-members of the tribe. Federal pre-emption of trade with Indians was not at issue in that case. The Indian trader laws were not even mentioned in *Potawatomi*.

The Court held in *Potawatomi* that state taxes could not be assessed against an Indian tribe, declining Oklahoma's invitation to cast aside the long-standing doctrine of tribal sovereign immunity. The Court also held, however, that tribal sovereign immunity does not prevent a state from requiring an Indian tribe to collect taxes from non-members of the tribe on *retail* purchases, citing *Moe* and *Colville*. 498 U.S. at 512.

Rather than expand the application of *Moe* and *Colville* to allow state regulation of transactions subject to the Indian trader laws, the Court in *Potawatomi* simply reaffirmed its prior decisions in *Moe* and *Colville* concerning the regulation of *retail* sales to *non-Indians*:

> Those cases stand for the proposition that the doctrine of sovereign immunity does not prevent a State from requiring *Indian retailers* doing business on tribal reservations to *collect* a state-imposed cigarette tax on their *sales to non-members of the Tribe*.

Potawatomi, 498 U.S. at 513 (emphasis supplied).

In *dictum* relied on by the State in this case, the Court responded to Oklahoma's contention that the decision left it without a remedy to enforce its right to impose its tax on tribal sales to non-Indians under *Moe* and *Colville*. The Court stated:

> [W]e are not persuaded that [the State] lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra*, 447 U.S. at 161-162, 100 S.Ct., at 2085-2086, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C. §476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514.

The State reads the *dictum* regarding taxing wholesalers as applicable to every wholesale transaction with an Indian, on or off the reservation. The Atteas urge that it is more appropriate to view such comment in the context of the *Potawatomi* case and the facts and issues presented therein. The tax in *Potawatomi* was not imposed on the wholesale transaction. It was assessed against the tribe because of its failure to collect the tax from non-Indian customers at the retail level. An assessment against a wholesaler trading with Indians was not at issue. Wholesalers were not even parties to

the case, and hence their interests were not pertinent to the Court's decision. Federal pre-emption under the Indian trader statutes was not briefed or argued or referred to in the opinion. Most importantly, the key opinions in *Warren Trading Post* and *Central Machinery* were not mentioned.

The Court's *dictum* was made in the context of listing various alternatives available to the state in lieu of direct taxation of a tribe, by way of illustration rather than analysis. For example, the case cited in *Potawatomi* for taxing wholesalers, *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), was decided on procedural grounds. In that case, the Tenth Circuit Court of Appeals held that the bankruptcy court lacked jurisdiction to review an assessment of state cigarette tax against a wholesaler because the tax had become finally assessed and the wholesaler failed to seek timely judicial review of the assessment prior to the filing of a bankruptcy petition. 898 F.2d at 124-25. The Court in *City Vending* did not address the merits of the case or consider the doctrine of federal pre-emption. 898 F.2d at 125.

It is respectfully submitted that the more reasonable interpretation of the general *dictum* in *Potawatomi* is that states may tax wholesalers except where states lack the power to do so, by reason of the Constitution, the laws or treaties of the United States. A contrary interpretation would require a conclusion that the Court overruled *Warren Trading Post* and *Central Machinery* without even citing such cases. Moreover, if states had the power to tax sales by Indian traders to Indians on reservations as the State claims under *Potawatomi*, there would be no need to consider the other alternatives suggested by the Court, such as tax collection agreements with tribes, or relief from Congress.

C. The Policy Arguments Raised by the State and *Amici* for overruling or limiting Warren Trading Post and Central Machinery should be addressed to Congress.

This Court has never wavered from its determinations in *Warren Trading Post* and *Central Machinery* that Congress intended to pre-empt state authority to regulate or tax the sale of goods by Indian traders to Indians on reservations. Because the Court previously determined in those decisions that Congress intended to occupy the field of regulating sales to Indians on Indian reservations, the Court need not re-examine the various federal, state and tribal interests involved, as the State and various *amici* contend. The Court balanced those interests in *Warren Trading Post* and *Central Machinery* and found that Congress had occupied the field. It is not necessary for the Court to re-invent the wheel on a case by case basis each time a state attempts to tax or regulate transactions within a field already found to be pre-empted by federal law.

The Court made it perfectly clear in *Central Machinery* that a change in the pre-emptive effect of the Indian trader statutes would have to come from Congress by stating:

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a "sweep as broad as [their] language" . . . .

448 U.S. at 166 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Congress has not often seen it appropriate to permit states to regulate matters pertaining to Indians. The Court has often observed that there is a " 'deeply rooted'

policy in our Nation's history of 'leaving Indians free from state jurisdiction and control' ", *Oklahoma Tax Com. v. Sac and Fox Nation*, _____ U.S. _____, 113 S.Ct. 1985, 1991 (1993) (quoting *McClanahan*, 411 U.S. at 168). *See also United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting that the Indians are in need of the federal government's protection from the states in which the reservations are located).

This is not to say that Congress never authorizes states to act in matters involving trade with Indians. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court held that Congress specifically and expressly authorized state regulatory burdens on liquor transactions on Indian reservations under 18 U.S.C. §1161. The Court noted that "[i]n *Warren Trading Post Co.*, we held that Congress did not authorize *any* additional burdens on the licensed trader while in this case we think that Congress did authorize the regulation." 463 U.S. at 734 n.18 (emphasis added). No similar authorization from Congress exists to permit state taxation and regulation of the Atteas' sales of cigarettes to Indians on Indian reservations.

Although Congress has had over 25 years to change the decision in *Warren Trading Post* if it disagreed with it, Congress has not chosen to do so. *See, Hilton v. South Carolina Public Railways Commn.*, _____ U.S. _____, 112 S.Ct. 560, 564 (1991); *see, also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we [the Supreme Court] have done"). Adherence to the principle of *stare decisis* is particularly important in a case such as this where parties engaged in commerce have set up and invested in trading relationships in reliance upon the Court's prior holdings that the Indian trader statutes leave no room

for any supplementary state burdens. *See, Payne v. Tennessee,* _____ U.S. _____, 111 S.Ct. 2597, 2610 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

The State essentially urges the Court to overrule *Warren Trading Post* and *Central Machinery* and contends that the collection of the tax at the wholesale level is necessary to prevent tax evasion by non-Indian retail customers, offering completely speculative and unsubstantiated estimated losses which the petitioners admit were not a part of the record below.[11]

Similar tax evasion arguments were rejected in North Dakota's recent unsuccessful attempt to convince the Court that a State may require out-of-state mail-order distributors to collect use taxes on purchases in interstate commerce by residents of the state. *Quill Corp. v. North Dakota,* _____ U.S. _____, 112 S.Ct. 1904 (1992). Just as Congress has power to regulate commerce among the states and, in some instances, may authorize state actions that burden interstate commerce (*Id.* at 1909), so too may Congress authorize state burdens on commerce with Indians. Until Congress chooses to authorize supplementary state taxation and regulation of sales to Indians, however, the law is clear—the state may not impose any burdens on wholesale sales to Indians on Indian reservations.

The goal to be achieved through the State's regulatory efforts, however meritorious or justified it may be, is immaterial. Where Congress has occupied the field, the

[11] In the trial court, the State estimated its revenues lost from non-collection of the tax on on-reservation sales of cigarettes to non-Indians at $10-15 million (R. 121). Before this Court, the state estimates such uncollected taxes at $65 million (Pet. Brief at 11).

State cannot impose any regulations, whatever their justification. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 203-04, 213-14 (1982). *See also New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983) (explaining that in addition to the broader pre-emption analysis conducted by the Court in Indian matters, "... a state will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption ...").

In any event, as outlined by the Court in *Potawatomi,* the State has alternate remedies. Affirmance of the Court of Appeals' narrow holding in this case would not prevent New York from enacting proper legislation applicable to retail purchases by non-Indian retail customers. The cases relied on by Petitioners, *Moe, Colville* and *Potawatomi,* all sanctioned minimal state burdens at the retail level. Also, New York may negotiate tax agreements with Indian tribes, another possible avenue noted by this Court in *Potawatomi,* 498 U.S. at 514. In 1988, New York negotiated such an agreement with the Seneca Nation of Indians, but it was not ratified. Perhaps different terms may be explored.

Finally, if these alternatives are not satisfactory, New York may seek relief from Congress, as noted by this Court in *Potawatomi. Id. See also Central Machinery,* 448 U.S. at 166. Indeed, the various *amici* briefs filed by competing cigarette vendors highlight the inherently political nature of balancing the various *private* interests at stake. Whether the Indian trader laws should be changed because, as *amici* contend, it is unfair to non-Indian cigarette vendors, is not for this Court to decide. The proper forum for balancing competing private interests is Congress.

See, County of Yakima v. Yakima Indian Nation, _____ U.S. _____, 112 S.Ct. 683, 692 (1992), quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 177 (1980) (concurring opinion of Rehnquist, *J.*) ("Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.").

In the *Quill Corp.* case, the State of North Dakota was faced with the difficult problem of collecting use taxes from its residents on purchases from out-of-state mail order distributors. The Court declined to overrule its prior holding in *National Bella Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), which precluded North Dakota's effort to have the out-of-state distributors collect such taxes from North Dakota's residents and remit the same to the state. The Court stated as follows:

> [T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

112 S.Ct. at 1916 (citation omitted).

The Court in *Quill Corp.* further noted that overruling its prior decision might raise "thorny questions" concerning the retroactive application of such use taxes which "might trigger substantial unanticipated liability for mail-order houses" and that "[t]he precise allocation of such burdens is better resolved by Congress rather than this Court." *Id.* at 1916 n.10.

The State's desire in this case to have the applicable taxes collected at the wholesale level is purely one of convenience and "policy". The State is supported in this case by *amici* briefs of 15 States, various governmental organizations such as the National Governors' Association and numerous trade associations. Considering this Court's directives in *Central Machinery* that a change in the pre-emptive effect of the Indian trader statutes would have to come from Congress, the State does not say why, with that type of political support, it cannot seek redress from Congress.

POINT II

THE STATE REGULATIONS ENCROACH UPON THE POWERS RESERVED TO THE COMMISSIONER OF INDIAN AFFAIRS BY THE INDIAN TRADER STATUTES.

This Court should affirm the Court of Appeals' decision on the additional grounds that the state's tax scheme at issue is pre-empted because it "impinges on the authority of the Commissioner of Indian Affairs to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians,' " and imposes "significant burdens" on wholesale sales to Indians. 81 N.Y.2d at 427 (A11-A12) (quoting 25 U.S.C. §261). *See also Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1940).

A. The State's Limitation on the Quantity of Unstamped Cigarettes Which Indian Traders May Sell is Pre-empted.

The State limits the quantity of unstamped cigarettes which may be sold by Indian traders by (1) calculating "the probable demand of qualified Indian consumers" on each reservation based on average consumption of cigarettes per capita in New York and either the number of enrolled tribal members or the reservation service area population, 20 NYCRR §335.7(d)(2)(ii) (A72); (2) calculating such demand for each "trade territory" (an area determined by the State) within each reservation, 20 NYCRR §335.7(d) (A72); (3) requiring prior approval of each wholesale sale to each wholesaler or retail dealer, 20 NYCRR §335.7(c)(2) (A72); (4) providing "Tax Exempt Coupons" to retailers which limit the amounts of untaxed cigarettes which they may buy for resale to non-Indians (JA 44a-45a); and (5) providing that if the

cigarette agent sells cigarettes in excess of the approved amount, he is liable for the tax on the excess amount. 20 NYCRR §335.7(e) (A74); (JA 45a). Because the State's regulations encroach upon the Commissioner's "sole power" to regulate quantity, 25 U.S.C. §261, they are pre-empted. *Hines*, 312 U.S. at 66-67.

In its brief, the State does not even address this issue. The State would have this Court believe that this case is about mere record-keeping burdens on the traders, and not about the other significant limitations imposed on sales by Indian traders to Indians, including especially the limitations as to quantity which are the very heart of the challenged regulations. The State claims that its regulations "require only that wholesalers keep a record of their taxable and tax exempt sales as an adjunct of the State's unquestioned right to require the collection and remition [sic] of taxes on sales to non-Indians." Pet. Br. at 23. But one of the so-called "records" which the trader must retain is the "Tax Exemption Coupon" which the trader must obtain from the retailer *as a condition of making the sale.* (JA 45a). The availability of the Tax Exemption Coupons is strictly limited by the State to the numbers which *it alone*[12] determines are needed to meet "the probable demand of qualified Indian consumers" for cigarettes on each reservation, in each

[12] A tribe may submit evidence of "probable demand" only if the tribe "regulates licenses or controls the sale and distribution of cigarettes within the reservation," and even then it is the State which makes the determination unilaterally. 20 NYCRR §335.7(d)(2)(i) (A73).

"trade territory," and from each dealer.[13] The Tax Exemption Coupons are thus no mere "records." They are rationing coupons allotted by the State, and any sales in excess of the amounts shown on the coupon are considered taxable by the State. 20 NYCRR §335.7(e) (A74; JA 45a).

B. The State's Requirement that the Tax be Included as Part of the Price is Pre-empted.

The State's regulations require the cigarette excise tax to be paid on all sales in excess of the pre-approved amounts. 20 NYCRR §335.7(c) (A72; JA 45a). The tax law provides that such tax "shall be advanced and paid by the agent," and shall then be "added to and collected *as part of the sale price* of the cigarettes." New York Tax Law §471[2], [3] (A46-A47) (emphasis added); *see* 81 N.Y.2d at 422 (A4). The State admits that "the tax is added and collected as part of the selling price," Pet. Br. at 10 (*see also* R 124), but offers no explanation of why this direct conflict with 25 U.S.C. §261 does not render the regulations void. Because the regulations encroach upon the Commissioner's sole power to regulate price, they are pre-empted.

Amici argue that Section 261 should be read narrowly "in light of its purpose of preventing fraud," and that the taxes are "fair and reasonable" and thus comply with the BIA price regulations. Nat'l Gov. Ass'n Brief at 20 (citing 25 C.F.R. §140.22 (RA22)). The purpose of section 261, however, was to grant the Commissioner full

[13] The Department claims in its brief that it calculates the "*maximum* legitimate Indian consumption" or the "*maximum* probable demand" for cigarettes by Indian consumers. Pet. Br. at 11, 24 (emphasis added). In fact the regulations nowhere use either term. Rather, they calculate the "probable demand" based on *average* per capita consumption by New Yorkers and estimates of the number of Indian consumers, as described above.

and sole authority to regulate trade with Indians, including specifically the price at which goods are sold to the Indians. This is clear from the language of the statute itself. The state regulations thus encroach upon the Commissioner's authority and are pre-empted; whether or not the taxes are fair and reasonable is irrelevant.

C. The Requirements that Indian Traders Obtain State Licenses and Sell Only to Dealers Registered by The State are Pre-empted.

The Indian trader statutes provide that the Commissioner has "[t]he sole power and authority to appoint traders to the Indian tribes," 25 U.S.C. §261; and that no non-Indian shall introduce goods or trade on a reservation "without such license." 25 U.S.C. §264 (A45). The Commissioner has promulgated extensive regulations recognizing and implementing his "sole power and authority to appoint [Indian] traders." 25 C.F.R. §140.1 (RA12); *see also* 25 C.F.R. §§140.9, .11 - .26 (RA19-RA23).

The State's regulations limit and prescribe conditions as to who may sell cigarettes to Indians on the reservation. Under the State's scheme, "only . . . licensed cigarette agents may sell tax-free products either to an Indian nation or to a registered dealer . . ." (JA 44a). Cigarette agents must also obtain a wholesaler's license to sell at wholesale. 20 NYCRR §331.1(e)(2) (RA7). The regulations would therefore require Elias Attea and other Indian traders to obtain state licenses in order to conduct the very business authorized by their federal licenses. The regulations therefore encroach upon the Commissioner's sole power to "appoint" persons to trade with the Indians, 25 U.S.C. §261; *see also*, 25 U.S.C.

§§262, 264; 25 C.F.R. §140.1 (RA12), and they are therefore pre-empted. *See Moe*, 425 U.S. at 475-81 (state's vendor license fee pre-empted as to Indian retailers), *aff'g, Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1307, 1317 (D.Mont. 1975) (state could not require Indian retailer to possess cigarette dealer's license). *See also Rice*, 463 U.S. at 735 (Blackmun, *J.*, dissenting) ("A State, through its own licensing requirements, cannot choose who may trade with the Indians and what goods they may sell.").[14]

Similarly, the State cannot, consistent with the Indian trader laws, limit to whom the Indian traders may sell. Where, as here, the traders' licenses authorize them to sell to Indians on particular reservations without limitation as to whom they may sell (*see, e.g.*, R 339-43), the state cannot impose such limitations. Thus, the State's rules limiting sales by traders to pre-approved sales to Indian retailers who are "registered dealers," and to tribes that have "exempt organization certificates," 20 NYCRR §335.6(b)(4), (d)(1) (A63, A65), are pre-empted.

[14] In *Rice*, the Court upheld the requirement that a federally-licensed Indian trader obtain a state liquor license because Congress had delegated authority to the states to regulate the sale of liquor to Indians. 463 U.S. at 715, 734 n.18.

POINT III

BY IMPOSING ITS TAX ON THE WHOLESALE SALE BY INDIAN TRADERS TO INDIANS, THE STATE ILLEGALLY TAXES INDIANS.

The Court of Appeals further concluded that "[t]he tax scheme requires wholesale distributors to prepay taxes on all cigarettes delivered on the reservation in excess of the predetermined maximum amount and, with respect to those cigarettes, *imposes a sales tax on Indian retailers.*" 81 N.Y.2d at 427 (A11) (emphasis supplied).

The Court has traditionally accorded great deference to interpretations of state tax provisions by the highest court of a state. *See, e.g., United Air Lines v. Mahin, Director of Department of Revenue*, 410 U.S. 623, 629 (1973) ("this Court usually has deferred to the interpretation placed on a state tax statute by the highest court of the State").

The imposition of a tax on the Indian retailer clearly violates the long-standing principle that Indians are immune from paying state taxes for activity conducted in Indian country since states may tax Indians only when Congress has manifested clearly its consent to such taxation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *see also, McClanahan*, 411 U.S. at 170-71.

The imposition of a tax upon the wholesale sale to an Indian on a reservation under the New York Tax Law is significantly different from the imposition of the tax under the Washington tax statute in *Colville*. The Washington statute imposed a cigarette tax "at the time and place of the first taxable event occurring within this State." R.C.W. 82.24.080. The Court explained in *Colville* that "where the wholesaler or retailer is an Indian on

whom the tax cannot be imposed under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser." 447 U.S. at 142 n.9. The Washington cigarette tax statute at issue in *Colville* was upheld because it limited imposition of the tax to the first taxable event. *Id.* at 140, n.2; *see also* the district court opinion in *Colville*, 446 F.Supp. 1339, 1355 n.15 (E.D. Wash. 1978).

While New York intends that the "ultimate incidence of and liability for the tax" is upon the consumer, New York Tax Law §471(2), by requiring wholesalers to pay, and collect from Indians, the tax at the wholesale level, the New York tax scheme imposes a liability *prior to* the first constitutionally permissible taxable event.

Because the Court of Appeals concluded that New York's cigarette tax scheme impermissibly imposes a tax upon the Indian retailer (A11-A12), the tax scheme is invalid.

CONCLUSION

The order of the Court of Appeals should be affirmed.

Dated: January 14, 1994.

Respectfully submitted,

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RESPONDENTS' APPENDIX

NEW YORK TAX LAW

§ 472. Preparation and sale of stamps; commissions; distributors

1. The tax commission shall prescribe, prepare and furnish stamps of such denominations and quantities as may be necessary for the payment of the tax on cigarettes imposed by this article, and may from time to time and as often as it deems advisable provide for the issuance and exclusive use of stamps of a new design and forbid the use of stamps of any other design, in the manner and with the effect provided in section two hundred seventy-four of this chapter. The tax commission shall make provisions for the sale of such stamps at such places and at such times as it may deem necessary and may license agents for such purpose. The tax commission may license dealers in cigarettes, who maintain separate warehousing facilities for the purpose of receiving and distributing cigarettes and conducting their business, who have received commitments from at least two cigarette manufacturers whose aggregate market share is at least forty percent of the New York state cigarette market, and importers, exporters and manufacturers of cigarettes, and other persons within or without the state as agents to buy or affix stamps to be used in paying the tax herein imposed, but an agent shall at all times have the right to appoint the person in his employ who is to affix the stamps to any cigarettes under the agent's control. The fee for filing such application for an agent's license shall be one thousand five hundred dollars, unless such fee has been paid during the preceding twelve months, in which case, the fee for a new license shall be one thousand dollars. All of the provisions of section four hundred eighty relating to wholesale dealers' licenses, including the procedure for

suspension, revocation, refusal to license, and for hearings, shall be applicable to agents' licenses applied for or granted pursuant to this section, as if such provisions had been set forth in full in this subdivision and had expressly referred to the applicant for, or the holder of, an agents's[1] license. Whenever the tax commission shall sell and deliver to any such agent any such stamps, such agent shall be entitled to receive as compensation for his services and expenses as such agent in selling or affixing such stamps, and to retain out of the moneys to be paid by him for such stamps, a commission on the par value thereof. The tax commission is hereby authorized to prescribe a schedule of commissions, not exceeding five per centum, allowable to such agent for buying and affixing such stamps. Such schedule shall be uniform with respect to the different types of stamps used, and may be on a graduated scale with respect to the number of stamps purchased. The tax commission may, in its discretion, permit an agent to pay for such stamps within thirty days after the date of purchase and may require any such agent to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state or other security acceptable to the tax commission, in such amount as the tax commission may fix, to secure the payment of any sums due from such agent pursuant to this article. If securities are deposited as security under this subdivision, such securities shall be kept in the custody of the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from

[1] So in original.

such agent pursuant to this article, but no such sale shall be had until after such agent shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale, the surplus, if any, above the sums due under this article shall be returned to such agent.

* * *

(As amended, L.1987, c. 860, § 1; L.1989, c. 61, § 77.)

Historical and Statutory Notes

* * *

1987 Amendment. Subd. 1., L.1987, c. 860, § 1, eff. Jan. 22, 1988, provided for the licensing of agents rather than appointment, provided for the licensing of certain dealers, provided for an application fee, and provided that the provisions of section 480 relating to wholesale dealers' licenses shall be applicable to agents' licenses.

Effective Date of Amendment by L.1989, c. 61; Applicability. Amendment by L. 1989, c. 61, § 77, eff. Apr. 19, 1989, and to apply on and after July 1, 1989, pursuant to section 365(d) of L.1989, c. 61, set out as a note under section 210.

Effective Date of Amendment by L.1987, c. 860; Certification and List of Registered Persons; Relicensing and Reregistering. Amendment by section 1 of L.1987, c. 860, effective Jan. 22, 1988, with the commissioner to certify persons registered as chain stores, etc., furnish a list of such persons, and to relicense and reregister agents, wholesale dealers and chain stores as provided in section 15 of L.1987, c. 860, as amended, set out as a note under section 489.

Severability of Provisions of L.1989, c. 61. See section 364 of L.1989, c. 61, set out as a note under section 424.

Separability of Provisions of L.1987, c. 860. See section 14 of L.1987, c. 860, set out as a note under section 483.

Cigarette Marketing Standards Advisory Council. See section 13 of L.1987, c. 860, set out as a note under section 480.

20 NYCRR PART 331

AGENT'S LICENSE

* * *

Historical Note

Part (§§ 331.1-331.10) repealed, new (§§ 331.1-331.8) filed Oct. 17, 1989 eff. Nov. 7, 1989.

Section 331.1 Licensing of agents. [Tax Law, §§ 471, 472(1), 473, 475, 480(1), (4) and 481(2)] (a) *Licensing of agents.*

* * *

(2)(i) The department may license as a cigarette agent, a dealer in cigarettes, either at the wholesale or retail level, to purchase cigarette tax stamps and to affix such stamps on packages of cigarettes to be sold by the dealer in New York State. Such dealer must maintain a separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting its business, and must receive commitments from at least two cigarette manufacturers whose aggregate market share of the New York State cigarette market is at least 40 percent.

(a) A separate warehousing facility for the purpose of receiving and distributing cigarettes and conducting business shall mean a warehouse, storehouse or other commercial building, or a group of such buildings, wherein cigarettes are received, stored and distributed and the dealer's day-to-day business activities are conducted. Such a warehousing facility must be separate and distinct from any other person's facilities. A warehousing facility shall not include a mere enclosure within a larger facility, nor a means of transportation (*i.e.*, a truck or van).

(b) In addition to maintaining such a separate warehousing facility, an applicant dealer must receive and forward to the department as proof thereof, written commitments from two or more cigarette manufacturers, who collectively share at least 40 percent of the New York State cigarette market, to the effect that such manufacturers agree or pledge to sell cigarettes directly to the dealer.

* * *

(c)(1) The Department of Taxation and Finance, in order to protect the State's cigarette tax revenue and to insure compliance with the cigarette marketing standards contained in article 20-A of the Tax Law, may periodically review the status of a licensed agent and may, at any time, require any such person to submit to the department:

(i) any records maintained in the normal course of business, including but not limited to, any records required to be maintained by the department; and

(ii) current financial statements certified by a licensed public accountant or a certified public accountant pursuant to an audit conducted by such accountant.

(2) Not more often than once every three years, the department (in order to properly administer the cigarette tax imposed by article 20 of the Tax Law or the Cigarette Marketing Standards Act contained in article 20-A of such law) may require every licensed cigarette agent to file a new application for a license, again comply with, or prove its compliance with, all of the requirements of the Tax Law and this Title in relation to cigarette agent's licenses and to surrender its existing license (see section 331.8 of this Part).

* * *

(e)(1) A license as an agent granted pursuant to article 20 of the Tax Law and this Part does not necessarily qualify a person as an agent for purposes of the cigarette marketing standards contained in article 20-A of the Tax Law (see article 2 of this Subchapter).

(2) Where an applicant for a license as a cigarette agent or where an agent is also a wholesale dealer of cigarettes, such applicant or agent must also obtain a license as a wholesale dealer pursuant to Part 332 of this Title. Both the application for a license as a cigarette agent and the application for a license as a wholesale dealer of cigarettes are subject to individual application filing fees.

* * *

Section 331.2 Agent's Bond Requirements. [Tax Law, 472(1)].

* * *

(b) *Performance bonds.* At the time of application for a license as a cigarette agent, an applicant must submit to the Department of Taxation and Finance a performance bond with the people of the State of New York as beneficiary (or arrange for the deposit with the department of other acceptable security) in the penal sum of $1,000. Such bond is to insure that

the licensee will properly perform the duties and responsibilities of a cigarette agent as required by article 20 of the Tax Law and the rules and regulations promulgated thereunder and that such licensee will not suffer or permit any violations of such provisions of the Tax Law or rules or regulations to give cause for the cancellation or suspension of such agent's license.

* * *

331.3 **Deposit of other security.** [Tax Law, § 472(1)] (a) In lieu of the bonds described in section 331.2 of this Part, an applicant or an agent may deposit with the Department of Taxation and Finance other security, approved by the department, in such amounts as it may require. Among the kinds of security which may be acceptable are the following:

(1) certificated United States Treasury bonds;

(2) certificated bonds of New York State;

(3) certificated bonds of any political subdivision of New York State having general governmental powers, and in connection with which, the credit of the political subdivision is pledged for the payment of the interest and principal due on such bonds;

(4) financial institution passbooks and certificates of deposit;

(5) irrevocable standby letters of credit made payable to the New York State Department of Taxation and Finance; and

(6) any other forms of security acceptable to the Department of Taxation and Finance.

* * *

PART 332

CIGARETTE WHOLESALE DEALER'S LICENSE

* * *

Section 332.1 Licensing of wholesale dealers of cigarettes. [Tax Law, §§ 475 and 480]

* * *

(b)(1) An application for a license as a wholesale dealer of cigarettes must be made on a form prescribed by the Department of Taxation and Finance for such purpose and must fully disclose all of the information requested therein. Such application must be accompanied by a nonrefundable $1,500 fee for filing the application in the form of a bank check, certified check (or other guaranteed draft acceptable to the department) or money order, made payable to the Department of Taxation and Finance, unless such fee has been paid during the preceding 12 months, in which case, the fee for a new license shall be $1,000. There will be no fee, however, for the filing of an application for a license as a wholesale dealer where such application is based solely upon the ownership, operation or maintenance of one or more cigarette vending machines in, at or upon premises owned or occupied by another person.

* * *

(4) Not more often than once every three years, the department (in order to properly administer the cigarette tax imposed by article 20 of the Tax Law or the Cigarette Marketing Standards Act contained in article 20-A of such law) may require every licensed wholesale dealer to file a new application for a license, again comply with, or prove its compliance with, all of the requirements of the Tax Law and this Title in relation to wholesale dealers and to surrender its existing license. The provisions of

section 331.8 of this Title apply to the provisions of this paragraph in the same manner and with the same force and affect as if the language had been incorporated in full into this paragraph and had expressly referred to the wholesale dealer's license under this Part. The department may, in its discretion, relicense wholesale dealers and cigarette agents concurrently.

* * *

[338]* 25 CODE OF FEDERAL REGULATIONS
PART 140

PART 140—LICENSED INDIAN TRADERS

Sec.

140.1 Sole power to appoint.
140.2 Presidential prohibition.
140.3 Forfeiture of goods.
140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.
140.9 Application for license.
140.11 License period.
140.12 License renewal.
140.13 Power to close unlicensed stores.
140.14 Trade limited to specified premises.
140.15 License applicable for trading only by original licensee.
140.16 Trade in annuities or gratuities prohibited.
140.17 Tobacco sales to minors.
140.18 Intoxicating liquors.
140.19 Drugs.
140.21 Gambling.
140.22 Inspection of traders' prices.
140.23 Credit at trader's risk.
140.24 Cash payments only to Indians.
140.25 Trade in antiquities prohibited.
140.26 Infectious plants.

AUTHORITY: Sec. 5, 19 Stat. 200, sec. 1, 31 Stat. 1066 as amended; 25 U.S.C. 261, 262; 94 Stat. 544, 18 U.S.C. 437; 25 U.S.C. 2 and 9, and 5 U.S.C. 301, unless otherwise noted.

SOURCE: 22 FR 10670, Dec. 24, 1957, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1962.

* Page references are to Volume 25, Code of Federal Regulations.

CROSS REFERENCES: For law and order regulations on Indian Reservations, see part 11 of this chapter. For regulations pertaining to business practices on Navajo, Hopi and Zuni reservations, see part 141 of this chapter. For additional regulation of certain employees trading with Indians, see 43 CFR part 20.735-28 and 29.

§ 140.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 140.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

(R.S. 2132; 26 U.S.C. 263).

§140.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all

merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500; *Provided*, That this section shall not apply to any person residing among or trading with the Choetaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

(R.S. 2133, as amended; 25 U.S.C. 264).

§140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.

(a) Definitions of terms as used in this part:

[339] (1) "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

(2) "Bureau" or the "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the Assistant Secretary for Indian Affairs, both in the Department of the Interior.

(3) "Employee" means an officer, employee, or agent of the Bureau of Indian Affairs.

(4) "Secretary" means the Secretary of the Interior.

(5) "Contract" means any agreement made or under negotiation with any Indian for the purchase, transportation or delivery of goods or supplies.

(6) "Trading" means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services.

(7) "Commercial trading" means any trading transaction where an employee engages in the business of buying or selling services or items which he/she is trading.

(b) With the exceptions provided in subsection (b) of section 437 of title 18 U.S. Code, section 437 provides that whoever, being an officer, employee, or agent of the Bureau of Indian Affairs, has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of another person where such officer, employee, or agent benefits or appears to benefit from such interest;

(1) In any contract made or under negotiation with any Indian, for the purchase, transportation or delivery of goods or supplies for any Indian, or

(2) In any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined not more than $5,000 or imprisoned no more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

(c) The further subsections of this section authorize certain employees contracting and trading with Indians as authorized by the exceptions in section 437 of title 18 U.S. Code. All such contracting and trading is subject to

the express provision of section 437 that none of the sales or purchases so authorized may be made if the purpose of any such sale, trade, or purchase is that of commercially selling, reselling, trading, or bartering such property.

(d)(1) Under authority granted by section 437(b)(1) of title 18 U.S. Code employees of the Bureau of Indian Affairs may, with the approval of an authorized officer of the Bureau, as designated in paragraph (d)(2) of this section, purchase from or sell to an Indian any service or any real or personal property, not held in trust by the United States or subject to a restriction against alienation imposed by the United States, or any interest in such property. In addition, employees may purchase from Indians without approval from an authorized officer of the Bureau any non-trust or unrestricted personal property for home use or consumption the value of which property does not exceed $1000. Where the purchase or sale price is less than $1,000, employees may also purchase motor vehicles for their personal use from Indians or sell their personal motor vehicles to Indians without obtaining approval of such purchases or sales from an authorized officer of the Bureau. Approval must be obtained if the purchase or sale price is $1,000 or more.

(2) As used in paragraph (d)(1) of this section an authorized officer of the Bureau of Indian Affairs for employees on reservations and in agencies or in field service units shall be the superintendent or other officer in charge of the unit in which the employee is employed. The authorized officer for the superintendent or officer in charge is his or her immediate supervisor. The authorized officer for [340] employees in area offices is the Area Director, and the authorized officer for an Area Director

is his or her immediate supervisor. The authorized officer for employees in the Central Office is the Deputy Assistant Secretary—Indian Affairs (Operations).

(e) No employee of the Bureau of Indian Affairs may have any interest in any purchase or sale involving property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau if such employee is employed in the office or installation of the Bureau which recommends, approves, executes, or administers such transaction, grant, or contract on behalf of the United States, except that, as authorized by section 437(b)(1) of title 18 U.S. Code an employee of the Bureau may have such an interest if such purchase or sale is approved by an authorized officer of the Bureau, as designated in paragraphs (e)(3) to (5) of this section, and the conditions in (e)(1) and (2) of this section are satisfied to the extent to which they are applicable to the transaction concerned;

(1) The conveyance or granting of any interest in property held in trust or subject to restriction against alienation imposed by the United States is otherwise authorized by law.

(2) Trading by employees with Indians which involves property or funds which are either held in trust by the United States or are subject to restrictions against alienation imposed by the United States must be conducted on the basis of sealed bid or public auction. If the trading involves leases or sales of trust or restricted Indian land it must be conducted on the basis of sealed bids. Such requirements for sealed bid or public auction may only be waived by the Assistant Secretary for Indian Affairs on the basis of a full report showing:

(i) The need for the transaction,

(ii) The benefits accruing to both parties,

(iii) That the consideration for the proposed transaction shall be not less than the fair market value of the trust or restricted property or interest therein, unless the employee is involved in a transaction in accordance with § 152.25 (c) or (d) or § 162.5(b)(1), (2), or (3) of this title or the employee is the recipient of a benefit for tribal members for which a uniform charge to all members is made, and

(iv) An affidavit as follows shall accompany each proposed transaction: "I (name) (title), swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my employment in the Bureau in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction."

(3) The authorized officer of the Bureau for employees employed on reservations, in agencies or service units is one who is not a relative by blood or marriage of the employee, and is not employed at the employee's reservation, agency or service unit. That officer must also be employed at not less than one grade level higher than such employee at the Washington, District of Columbia, Central Office or at an Area Office other than that with authority over the employee's reservation, agency, or service unit.

(4) The authorized officer of the Bureau for employees employed in Area offices is one who is not a relative by blood or marriage of the employee, is not employed at the employee's area office, and must be employed at not less than one grade level higher than the employee at the Washington, District of Columbia, Central Office.

(5) The authorized officer of the Bureau for employees employed at the Washington, District of Columbia, Central Office is the Secretary.

(f) Except as provided in subsection (b)(2) of section 437 of title 18 U.S. Code as implemented by this section, nothing in the cited law shall be construed as preventing any employee of the Bureau who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such employee who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or coop-
[341] erative association organized by Indians, when authorized under such rules and regulations as the Secretary or his/her designee has prescribed or shall prescribe.

[49 FR 26434, June 21, 1984]

§140.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any

person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

(c) When a license or permit to trade is issued under the regulations in this part 140, a fee of $5, payable when the license is issued, shall be levied against the licensee.

[30 FR 8267, June 29, 1965. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 140.11 License period.

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be

fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years.

[30 FR 8268, June 29, 1965. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 140.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-064, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 140.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 140.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

[342] § 140.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 140.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 140.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§140.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation,

drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§140.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§140.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§140.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the origial invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§140.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in

the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§140.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§140.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

[343] CROSS REFERENCES: For additional regulations pertaining to preservation of antiquities, see part 261 of this chapter. For regulations of the Bureau of Land Management regarding antiquities, see 43 CFR part 3.

§140.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservation any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

* * *

FOR ARGUMENT

23

No. 93-377

Supreme Court, U.S.
FILED
FEB 16 1994
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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK; JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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No. 93-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

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Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

In Point I we will discuss some matters presented by the Solicitor General, while in Point II we will deal with issues presented by the respondents.

POINT I

A.

Of course we agree with the Solicitor General (Br Point I) that this Court's decisions in *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463 (1976), *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980), *California State Board of Equalization v Chemehuevi Indian Tribe*, 474 US 9 (1985), and *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505 (1991), establish the right of States, notwithstanding the Indian Trader statutes, to impose certain minimal burdens on a reservation retailer's cigarette supplier, including the obligation to collect from the retailer the State tax due on cigarettes which will be sold by the retailer to non-Indians and the obligation to maintain records of its tax exempt sales to retailers. We agree, as well, that the treaties between the United States and the New York Indian Tribes do not act to prevent New York from taxing cigarette sales by Reservation retailers to non-Indians (Br, pp 21-24).[1] However, in arguing in Point II of his brief that the State's tax scheme is invalid "because it directly regulates and substantially burdens the distribution and sale of cigarettes to Indians" (Br, p 24), the Solicitor General has improperly injected new matter into this case which was neither argued by the parties nor decided by the Court of Appeals, and which is not fairly included within the question set forth in the petition for certiorari. Accordingly, the Court should decline to consider the arguments raised at Point II of the Solicitor General's brief.

[1]This argument was not raised by respondents and was neither briefed nor argued before the New York Court of Appeals. The Solicitor General's arguments were directed towards arguments made by the (Footnote continued on next page.)

As delineated by the question set forth in the petition for certiorari, the sole issue presented in this case is whether the State of New York may require wholesale Indian traders to comply with regulations limiting the quantity of tax exempt cigarettes which they may sell to their Indian customers and imposing upon them minimal burdens relating to record keeping and reporting. The question of whether the regulations unduly burden Indian retailers and Indian purchasers of cigarettes, as argued by the Solicitor General in Point II of his brief, was not raised by the respondents in the New York courts and is simply not a part of the case. Indeed, in its alternative holding, the Court of Appeals explicitly ruled that the subject regulations were improper *not* because of their impact upon Indian Tribes or Indian retailers, but because they imposed significant burdens "on the wholesaler" (A 11).[2]

(Footnote continued.)
Seneca Nation of Indians in an *amicus* brief filed in opposition to petitioners' petition for certiorari. The Seneca Nation has raised the same arguments in an *amicus* brief filed on the merits. Although we agree with the Solicitor General that the treaties do not prevent the State from taxing purchases of cigarettes by non-Indians, the issue is not properly before the Court and should not, therefore, be considered. Supreme Court Rules, Rule 14.1(a).

[2]Parenthetical references preceded by the letter "A" are to pages of the Appendix to the Printed Petition for Certiorari.

This Court's rules make clear that its grant of certiorari is limited to the questions set forth in the petition. Rule 14.1(a).[3] There exists no good reason why the Court should depart from its normal procedure to reach the issues raised in Point II of the Solicitor General's brief, which were neither presented, briefed, nor argued by the parties, and which are not fairly included within the question presented. *See, Holland v Illinois*, 493 US 474, 487 n 3 (1990). And this is particularly so since no Indian Tribe or retailer is a party to this litigation and there has been no evidence presented on the issue of whether the requirements of the regulations unduly burden Indian Tribes or retailers or are not reasonably necessary as a means of preventing fraudulent transactions. *Cf. Colville*, 447 US at 160. Without such a factual predicate, any determination with regard to the issues raised by the Solicitor General in Point II of his brief would be premature.

B.

In any event, the Solicitor General's characterization of the regulations is not sound. He asserts initially that the dealer registration requirements of the New York regulations (20 NYCRR 335.6[f][1]) are the equivalent of "a state licensing requirement for cigarette vendors" (Br, p 27). That is incorrect. The fact that the State requires sellers of cigarettes to register with the Department of Taxation and Finance before being permitted to sell unstamped cigarettes does not mean that the State is licensing vendors or precluding them from making tax exempt sales to their Indian customers.

[3]Rule 14.1(a) provides as relevant "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court".

The requirement that dealers must register with the Department of Taxation and Finance in order to be eligible to purchase unstamped cigarettes is a simple expedient designed to assure that unstamped cigarettes will be sold only to actual vendors. The requirement is intended to prevent fraud and provides the State with a simple means of tracking unstamped cigarettes, since only retailers who have registered with the Department of Taxation and Finance will be issued Tax Exemption Coupons permitting them to purchase unstamped cigarettes. Registration is virtually automatic and requires no more than that the vendor make an application to Department of Taxation and Finance. 20 NYCRR 335.6(f)(1). No fee is required. 20 NYCRR 335.6(f)(2). Finally, even if a dealer has not registered with the Department of Taxation and Finance, and does not possess unstamped cigarettes, he or she may still make legitimate tax exempt sales to their Indian customers, since under section 476 of the New York Tax Law the dealer would be entitled to a refund for any cigarette taxes which he or she had paid in error.

The Solicitor General is wrong as well in asserting (Br, pp 28-30) that the State's cigarette tax regulations conflict with the Indian Trader statutes because they place substantial burdens on the distribution and sale of cigarettes to Indians. The State's regulations are designed to segregate legitimate Indian demand for cigarettes from non-Indian demand. They seek to accomplish this in the first instance by inviting exempt Indian Nations or Tribes themselves to agree to "regulate, license, or control the sale and distribution" of untaxed cigarettes within their Reservations (20 NYCRR

335.7[c][1]), and to submit to the Department of Taxation and Finance evidence "relating to the average consumption of qualified Indian consumers on and near [their] reservation[s]". 20 NYCRR 335.7(d)(2)(i).[4]

In the absence of an agreement, the Department of Taxation and Finance will itself calculate probable demand based upon the New York average cigarette consumption per capita, multiplied by the number of enrolled members of the affected Nation or Tribe. 20 NYCRR 335.7(d)(2)(ii). As demonstrated in the affidavit of Jamie Woodward, made in opposition to respondents' motion for summary judgment in the New York Supreme Court, this formula results in a very generous allotment of tax exempt product (*see*, Record on Appeal, pp 244-245).[5] However, the regulations are intended to be descriptive of demand, not prescriptive, and the Tribes and retailers are free at any time to submit evidence

[4]The regulations define "exempt Indian nation or tribe" to include every Indian Nation or Tribe recognized by New York State. 20 NYCRR 335.6(b)(2). These include: Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians. The requirement that they hold a valid exempt organization certificate in order to purchase unstamped cigarettes (20 NYCRR 335.6[d][1][i]) is a mere formality and does not, as argued by the Solicitor General (Br, p 28 n 19), impinge upon tribal sovereignty.

[5]Mr. Woodward's description of the process was provided for informational purposes only. As we have noted previously herein, *supra*, pp 3-4, the issue of whether the regulations conflict with the Indian Trader statutes because they place substantial burdens on the distribution and sale of cigarettes to Indians was neither presented, briefed, nor argued by the parties in the courts below.

relating to consumption by Indian consumers.[6] Moreover, if a retailer does not possess sufficient unstamped cigarettes to meet the demand of his or her Indian consumers, the retailer can meet the demand by selling stamped product at the tax exempt price and then obtaining a refund under Tax Law § 476. Quite contrary to the assertions of the Solicitor General, we submit that these measures are quite reasonable as a means of segregating taxable from untaxable transactions. And this is especially so given this Court's teaching in *Potawatomi* that Tribal sellers of cigarettes have a legal obligation to assist in the collection of validly imposed State sales taxes on their sales of cigarettes to non-Tribal members. 498 US at 512. Consequently, the regulations do not violate the Indian Trader statutes.

POINT II

Respondents' objection (Br, p 40) to the regulations' requirement that wholesalers obtain prior approval for each sale and delivery of unstamped cigarettes to a Reservation retailer, an objection which was also raised by the Solicitor General (Br, p 28), is not well taken. As explained in Notice N-88-53 (Joint App pp 44a-50a), the regulations' pre-approval requirements (20 NYCRR 335.7[c] and [d]) are intended to be satisfied by the Tax Exemption Coupons which will be sent each month to registered Reservation dealers.

[6]20 NYCRR 335.7(d)(2)(i), which provides that in determining probable demand the Department of Taxation and Finance will "consult" with those Indian Nations and Tribes which regulate the sale and distribution of cigarettes within their Reservations, in no way precludes those Nations and Tribes which do not regulate the sale and distribution of cigarettes within their Reservations from submitting evidence to the Department of Taxation and Finance concerning the consumption of cigarettes by Indians within their Reservations.

Since the coupons are sent to the dealer in advance of the sale, based upon the dealer's needs, pre-approval of the sale by the Department of Taxation and Finance takes place automatically. Thus, no burden is placed upon the wholesaler and no violation of federal law occurs.

Nor are respondents correct in arguing (Br, pp 40-42) that the State's regulations impermissibly encroach upon the Commissioner of Indian Affairs' power to regulate the quantity of goods which Indian traders may sell to Indians by (1) calculating the probable demand of qualified Indian consumers on each Reservation, (2) calculating such demand for each "trade territory" within each Reservation and (3) requiring the payment of tax on any sales of cigarettes in excess of the calculated amount. As we have described previously, *supra* pp 5-7, the State's regulatory scheme is designed to segregate legitimate Indian demand for cigarettes from non-Indian demand. The regulations do so reasonably by seeking first to involve the Indian Tribes and retailers in the decision-making process and, in the absence of such involvement, by employing a formula which results in a generous allotment of tax exempt product to each Reservation. Since the regulations are designed to reflect legitimate Indian demand, and impose a tax only with respect to those cigarettes intended for sale to non-Indians, they do not, as argued by respondents, infringe upon the Commissioner's power to regulate the quantity of goods Indian traders may sell to Indians and are not preempted.

The respondents' further objections (Br, pp 43-44) that the State's regulations require them to obtain a license in order to sell cigarettes to Indians on reservations, and limit to whom they may sell, are similarly incorrect. If respond-

ents' sales were made *only* to Reservation Indians, and *only* for Indian consumption, there would be no requirement that they obtain a license from the State in order to sell cigarettes at wholesale. But it is undisputed that a portion of the cigarettes sold by respondents are resold to non-Indians.

This Court's decisions in *Moe*, *Colville* and *Potawatomi* make clear that sales of cigarettes to non-Indians by Reservation retailers fall outside the purview of the Indian Trader statutes and subject the retailers and their suppliers to reasonable regulation by the State, including damage actions against Tribal officers and assessments against their suppliers. *See*, *Potawatomi*, 498 US at 514. To the extent, therefore, that respondents' sales of cigarettes are ultimately destined for resale to non-Indians, we submit that respondents are subject to the full range of the State's enforcement mechanisms. This includes the requirement that they obtain a license from the State in order to sell their products at wholesale.

Moreover, the regulations do not, as implied by the plaintiffs (Br, p 43), mandate that *every* supplier of cigarettes to Indians be licensed by the State as a cigarette agent before they may sell tax free products to Indians.[7] Under the State's regulations unlicensed out-of-State suppliers may lawfully make tax exempt sales to Indian Tribes and retailers provided only that in effecting deliveries within New York they employ common or contract carriers, who, along with licensed cigarette agents, are permitted by statute to possess unstamped product within New York (New York Tax Law § 1814[g]). It is only if the suppliers wish to possess or

[7]To the extent that Notice N-88-53 appears to so state (JA 44a), the notice, which does not have the force or effect of a regulation, is in error.

transport the cigarettes within the State themselves that they would need to be licensed.

Furthermore, the State's regulations in no way limit to whom respondents may sell. Respondents are free to sell cigarettes to whomever they wish, including unregistered Reservation dealers. There are no criminal sanctions for their doing so. However, if respondents do sell cigarettes to unregistered dealers, they face the risk that they will be held responsible for any taxes which are not collected by the dealers on their sales to non-Indians. Respondents can protect themselves against this possibility by selling to registered dealers and obtaining and forwarding to the Department of Taxation and Finance a copy of the dealers' Tax Exemption Coupon. But they are not obligated by the regulations to do so; the choice is theirs.

Finally, respondents' argument (Br, pp 42-43) that the regulations are preempted because they require the tax to be included as a part of the price of those cigarettes intended for sale to non-Indians, fails because the sale of cigarettes to non-Indians by Reservation retailers lies outside the purview of the Indian Trader statutes. As we demonstrate in our principal brief (pp 25-26), the validity of such a precollection requirement with respect to a retailer's sale of cigarettes to non-Indians has long been recognized by this Court. *See*, *Moe*, 425 US at 483 (precollection requirement of Montana law held to be not a "tax" on Indians and thus not preempted). Of course, respondents' sales of cigarettes intended for Indian consumption are tax exempt.

CONCLUSION

For the reasons stated here and in petitioners' principal brief, the order of the Court of Appeals should be reversed.

Dated: Albany, New York
February 14, 1994

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

MILHELM ATTEA & BROS., INC., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

The Oneida Indian Nation of New York moves for leave to file the supplemental brief accompanying this motion.

The Oneida Nation filed a brief amicus curiae in support of Respondents, urging that the federal Indian trader statutes, 25 U.S.C. §§ 261 *et seq.*, preempt New York's regulation of cigarette distributors who trade with Indians. At the same time, two other amici, the Solicitor General and the Seneca Nation, also filed briefs in support of Respondents. These two briefs address the federal statutory preemption issue but also address the legal effect upon New York's cigarette wholesaler regulation of certain Indian treaties to which the Seneca Nation is a party. *See* Brief of the Seneca Nation Amicus Curiae, at 18-29; Brief of the

Solicitor General Amicus Curiae, at 21-24. The supplemental brief we seek to file urges that, because this treaty issue was not raised by the parties or addressed by the courts below, it should not now be addressed by the Court.

The New York Court of Appeals invalidated New York's cigarette wholesaler regulations on the ground that they were preempted by the federal Indian trader statutes. The Court of Appeals did not raise, discuss or decide any issue concerning Indian treaties. *See Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Finance*, 81 N.Y.S.2d 510 (N.Y. 1993). The question presented in New York's petition for a writ of certiorari did not mention or address the effect of Indian treaties, and the effect of such treaties was not raised in the text of the petition. *See* Petition for a Writ of Certiorari, August 31, 1993. The only question presented is the facial validity of the regulations at issue, not their application to particular Indian tribes. Consequently, neither the Petitioners nor Respondents have mentioned the treaty issue in their briefs in this Court or in any court below.[1]

In these circumstances, we seek to file a short supplemental brief to identify these circumstances for the Court, as they are important in deciding whether treaty issues can be injected into this case by amici at this point.

There is ample authority that the Court will not consider a legal issue that was not pressed or passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). The situation here is more aggravated because the parties themselves have never raised the issue. Moreover, the Seneca Nation currently is litigating in New York courts the effect of its particular treaties

[1] The Seneca Nation had mentioned the treaty issue in their amicus brief in the New York Court of Appeals, but the Court of Appeals disregarded the argument. The Seneca Nation also discussed the treaty issue in its opposition to New York's petition for a writ of certiorari, but until the Solicitor General's brief, no other participant in these proceedings has discussed treaty questions.

on New York's collection of taxes from Indians who sell cigarettes to non-Indians. New York's intermediate appellate court addressed the issue in *Snyder v. Wetzler*, 603 N.Y.S.2d 910 (N.Y. App. 1993), and the case is pending in the New York Court of Appeals pursuant to notice of appeal docketed January 7, 1994.

We note also that the parties most affected by the amici's arguments are not before the Court. There are many Indian tribes in New York and many different Indian treaties. Most of these treaties were not discussed in the briefs of the two amici who seek to raise the Indian treaty issue. Not all tribes are parties to all treaties, and each treaty has its own language and its own historical origin. The Oneida Nation, for example, has treaties with the United States that were not discussed by the amici.[2] Any analysis or decision on treaties necessarily would affect the rights of Indian tribes not before the Court and issues other than the tax issue in this case, all in the absence of a developed record.

In analogous circumstances, the Court has permitted the filing of a supplemental brief by amici. *Goldsboro Christian Schools, Inc. v. United States*, 456 U.S. 922 (1982) (amicus permitted to file supplemental brief addressing issue first raised by Respondent in supplemental memorandum).[3] Filing in this case will not

[2] *Compare* Treaty with the Oneida, Tuscarora and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47 (Oneida, Tuscarora and Stockbridge only) *with* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15 (treaty with Iroquois member nations); Treaty of Fort Hamar, Jan. 9, 1789, 7 Stat. 33 (same); Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44 (same).

[3] For other cases in which amici have filed supplemental briefs, *see Building & Construction Trades Council v. Associated Builders of Massachusetts/Rhode Island, Inc.*, 113 S.Ct. 651 (1993); *Dixon v. Westinghouse Electric Corp.*, 484 U.S. 910 (1987); *Boyle v. United Technologies Corp.*, 483 U.S. 1043 (1987); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 458 U.S. 1128 (1983); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970).

prejudice any party, as oral argument is scheduled for March 23, 1994.

Thus, the motion of the amicus curiae, the Oneida Indian Nation of New York, for leave to file the accompanying supplemental brief should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-377

DEPARTMENT OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

MILHELM ATTEA & BROS., INC., *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF RESPONDENTS

The Oneida Indian Nation of New York, amicus curiae in support of Respondents, filed a brief in this case urging the preemptive force of the Indian trader statutes. Both the Solicitor General and the Seneca Nation of Indians, in their briefs amicus curiae in support of Respondents and in support of preemption under the Indian trader statutes, also address a different issue -- the legal effect of certain Indian treaties to which the Seneca Nation is a party. *See* Brief of the Solicitor General Amicus Curiae at 21-24; Brief of the Seneca Nation Amicus Curiae at 18-29. We respectfully urge the Court not to reach questions concerning Seneca treaties specifically or, more generally, any other Indian treaties.

The treaty issue has not been argued or briefed by Petitioners or Respondents at any stage of this litigation, and consequently has not been discussed in any judicial decision in the record.[1] New York's petition for writ of certiorari does not present the issue. Rather, the question presented by this case is the facial validity of the New York cigarette tax regulations. Question Presented, Petition for Certiorari, at i, August 31, 1993. The validity of the regulations as applied to specific Indian tribes, under specific treaties, is not in issue. That is not surprising because Indian tribes are not parties to this proceeding.

With rare exception, when reviewing state court decisions the Court will not consider arguments that were not both pressed and passed upon in the courts below. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). That rule prevails even when a new argument is made by a party in a state's highest court, but the state court refuses to address it. *See, e.g., Yee*, 112 S. Ct. at 1531. The "pressed and passed upon" rule must have even more force here, where neither party has addressed the treaty argument at any stage.

The Court refuses to consider new issues because "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Illinois v. Gates*, 462 U.S. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). That is certainly the case here, where only two amici, but neither party, have discussed Indian treaty rights. The treaties raised are not in evidence. There is no historical documentary evidence or expert testimony in the record concerning the circumstances of the making of the treaties. There have been no hearings on the

[1] The issue was discussed in an amicus brief filed by the Seneca Nation of Indians in the New York Court of Appeals, but was not raised by the parties or addressed by the court.

meaning of the treaties, rounds of briefing below, or oral argument on the issue.[2]

Moreover, other parties to the treaties mentioned by the Seneca Nation and the United States have not had a full and fair opportunity to litigate the issue. No Indian nation in New York or member of such a nation is a party to this proceeding. Three of the four treaties discussed by the amici have many more signatories, including the Oneida Nation, in addition to the Senecas and the United States. *See* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Hamar, Jan. 9, 1789, 7 Stat. 33; Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44. An interpretation of the treaties without actual litigation and an evidentiary record, without the benefit of participation by the parties most concerned, "may prove ill-considered in other circumstances" and have "untoward practical ramifications." *Illinois v. Gates*, 462 U.S. at 224.

Conversely, there are other treaties with Indian tribes in New York to which the Seneca Nation is not a party, and these treaties have not been identified by the amici. *See, e.g.*, Treaty with the Oneida, Tuscarora and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47. Thus, a broad question concerning the effect of treaties on the New York regulations at issue in this case would reach the impact of treaties not even before the Court or identified in the record. Further, the impact would reach issues well beyond the particular tax issue presented in this case.

[2] The Seneca Nation currently is litigating in New York courts the effect of its particular treaties on New York's collection of taxes from Indians who sell cigarettes to non-Indians. The intermediate appellate court has addressed the issue. *Snyder v. Wetzler*, 603 N.Y.S.2d 910 (N.Y.App. 1993), and the case now is in the New York Court of Appeals pursuant to notice of appeal docketed January 7, 1994.

CONCLUSION

For these reasons, the Court should not address a treaty issue raised only by amici.

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Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

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IN THE

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DEPARTMENT OF TAXATION AND FINANCE
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Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

Amici curiae the Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee move for leave to file the supplemental brief accompanying this motion.

1. The issue in this case is whether the State of New York has the power to regulate trade occurring within Indian territory, including the lands of *amicus* Saint Regis Mohawk Tribe. Specifically, New York's Department of Taxation and Finance seeks to require pre-collection of excise taxes by wholesalers that sell cigarettes to Indian customers for resale to non-Indian consumers.

2. The parties to this case have addressed this issue in the context of the federal Indian trader statues, 25 U.S.C. §§ 261 -

264. The New York Court of Appeals below invalidated New York's cigarette wholesaler regulations on the ground that they are pre-empted by the federal Indian trader laws. *See Milhelm Attea & Bros., Inc., v. Department of Taxation and Fin.*, 615 N.E.2d 994 (N.Y. 1993).

3. The Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee filed a brief *amici curiae* in support of Respondents, arguing that the federal Indian trader laws pre-empt New York's regulation of cigarette wholesalers that trade with Indians on Indian land.

4. In briefs *amicus curiae*, the Solicitor General of the United States and the Seneca Nation of Indians addressed another issue in addition to the pre-emptive effect of the federal Indian trader laws, namely, the pre-emptive effect of certain treaties to which the Saint Regis Mohawk Tribe is a party. *See* Brief of the Seneca Nation of Indians *Amicus Curiae* at 18-29; Brief of the Solicitor General *Amicus Curiae* at 21-24.

5. The treaty issue addressed by the Solicitor General and the Seneca Nation was not raised by the parties or addressed by the courts below. The question presented in New York's petition for a writ of certiorari did not mention the effect of the treaties, and that issue was not raised in the petition itself. Neither Petitioners nor Respondents mentioned the treaty issue in their briefs in this Court or in any court below. In general, this Court will not consider a legal issue that was not pressed or passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983).

6. Analysis or decision of the treaty issue at this time necessarily would affect the rights and interests of *amicus* Saint Regis Mohawk Tribe and other Native American tribes not currently before the Court, in areas far beyond the scope of the tax issue in this case.

7. In analogous circumstances, this Court has granted leave for an *amicus* to file a supplemental brief. *See, e.g., Goldsboro*

Christian Schools, Inc. v. United States, 456 U.S. 922 (1982) (*amicus* allowed to file supplemental brief on issue first raised by Respondent in supplemental memorandum); *see also Building & Construction Trades Council v. Associated Builders of Massachusetts/Rhode Island, Inc.*, 113 S.Ct. 651 (1993); *Dixon v. Westinghouse Elec. Corp.*, 484 U.S. 910 (1987); *Boyle v. United Technologies Corp.*, 483 U.S. 1043 (1987); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 458 U.S. 1128 (1983); *Commonwealth of Massachusetts v. Laird*, 400 U.S. 886 (1970).

8. Filing of the accompanying supplemental brief *amici curiae* will not prejudice any party or delay the adjudication of this case. Petitioners agree that the treaty issue should not be considered. *See* Reply Brief for Petitioners, at 2 n.1.

CONCLUSION

For the foregoing reasons, the motion of *amici curiae* for leave to file the accompanying supplemental brief should be granted.

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February 28, 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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On Writ of Certiorari to the Court of Appeals of the State of New York

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SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

Amici curiae the Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee filed a brief in this case in support of Respondents addressing the pre-emptive effect of the federal Indian trader statues, 25 U.S.C. §§ 261 - 264. That issue is encompassed by the question presented on which this Court granted certiorari and was decided below by the New York Court of Appeals. Briefs *amicus curiae* filed by the Solicitor General of the United States and the Seneca Nation of Indians in support of Respondents also discuss another, separate issue: whether certain treaties entered into by Indian tribes and 25 U.S.C. § 233, which expressly limits New York State's authority to tax Indians, preclude New York from imposing taxes on and regulating sales of cigarettes by wholesalers to Indians on Indian land. *See* Brief

of the Solicitor General *Amicus Curiae* at 21-24; Brief of the Seneca Nation *Amicus Curiae* at 18-29.

In their briefs in support of Respondents, the Solicitor General and the Seneca Nation reach opposite conclusions regarding the treaty issue. Although *amici* Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee agree with the position of the Seneca Nation that the treaties involved preclude New York from imposing its taxes on activities occurring on Indian territory,[1] we respectfully urge this Court not to reach the treaty issue in this case.

The treaty issue was neither briefed nor argued below by any party. As a result, the issue has not been discussed in any judicial decision in the record. New York State's petition for a writ of certiorari does not present the treaty issue. Given the absence of any discussion of the issue in the briefs filed by the parties in this case, it appears that no party will present oral argument on the treaty issue. The treaties involved are not in evidence, and there have been no hearings, testimony, or briefs on the meaning and application of the treaties or the historical context in which they were made. Given these circumstances, a decision on the treaty issue by the Court in this case would be ill-advised.

In reviewing state court decisions, this Court generally will not consider arguments that were not both pressed and passed upon in the courts below. *See, e.g., Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). This Court declines to consider such new issues because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (quoted in *Illinois v. Gates*, 462 U.S. at 221).

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[1] *See* Brief of Saint Regis Mohawk Tribe and Mohawk Tax Steering Committee *Amici Curiae* at 9-10 n. 6.

In the pending case, as noted, the parties and the courts below have not discussed the treaty issue.

Analysis or decision of the treaty issue at this time also necessarily would affect the rights and interests of *amicus* Saint Regis Mohawk Tribe and other Native American tribes not currently before the Court, in areas far beyond the scope of the tax issue in this case.

Reserving decision on the treaty issue will not impair this Court's ability to resolve the question pending before it in this case. If the Court affirms the judgment below, the treaty issue will be moot. If the judgment below is reversed, the Court may remand, if appropriate, the treaty issue for consideration by the New York Court of Appeals in the first instance.

CONCLUSION

For the foregoing reasons, the question of the pre-emptive effect of certain treaties governing Indian tribes and 25 U.S.C. § 233 should be reserved for another time.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the New York regulatory scheme for collecting cigarette taxes due from non-Indian consumers through regulation of the sale of tax-exempt cigarettes by federally licensed Indian Trader wholesalers to Indian purchasers is preempted by federal law, including the Indian Trader Statutes, 25 U.S.C. 261 *et seq*.

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INTEREST OF THE UNITED STATES

The United States has an interest in the development of sound principles governing state taxation in Indian matters that further the policies of federal treaties and statutes promoting tribal sovereignty and economic independence. The preemption claim in this case is based on the Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, which are administered by the Department of the Interior.

STATEMENT

1. The State of New York imposes a tax in the amount of $0.56 per pack on all cigarettes purchased in the State, except where the State is without power to impose the tax. N.Y. Tax Law § 471.1 (McKinney Supp. 1994). "[T]he ultimate incidence of and liability for the tax shall be upon the

consumer," N.Y. Tax Law § 471.2 (McKinney 1987), but the tax is precollected at the beginning of the distribution stream when wholesalers purchase tax stamps from the State Tax Commission. A wholesaler must affix the stamps to the cigarette packs and collect the tax from its retailer-customers, who must, in turn, collect the tax from the ultimate consumers. *Ibid.* Unstamped cigarettes subject to tax may be forfeited (N.Y. Tax Law 1846(a) (McKinney 1987)), and criminal penalties attach to the "willful" possession of unstamped cigarettes without the written receipt required by New York Tax Law Section 474. See N.Y. Tax Law 1814(h) (McKinney Supp. 1994).

2. Respondents Milhelm Attea & Bros., Inc., and Elias Attea, Jr., are non-Indians who are wholesale distributors of cigarettes and tobacco products. In order to sell cigarettes to reservation Indian retailers, respondents obtained licenses from the Department of the Interior pursuant to the Indian Trader Statutes, 25 U.S.C. 261 *et seq.* Any retailers (whether Indian or non-Indian) who purchase cigarettes from respondents and resell them to Indians on the reservations are also covered by the Indian Trader Statutes.[1] Those Statutes confer on the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes and to make * * * rules and regulations * * * specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. 261. Implementing regulations govern, *inter alia*, license applications and fees, the sale of tobacco products to minors, federal audits of traders to assure fair and reasonable prices, and extensions of credit. See 25 C.F.R. Pt. 140; pages 25-26, *infra*.

3. Because the legal incidence of and liability for New York's cigarette tax falls on the ultimate consumer, sales

[1] It is our understanding that all or virtually all retailers on the New York reservations are Indians. We have been informed by the Department of the Interior that of the approximately 125 federally licensed Indian Traders in New York, 61 are Indians, all of whom are retailers, and 64 are non-Indians, all of whom are wholesalers.

by reservation retailers to tribal members are exempt from that tax under *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-481 (1976). By contrast, sales by reservation retailers to non-members are not exempt from state taxation. *Id.* at 481-483; *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980).

In 1988, New York's Commissioner of Taxation and Finance adopted regulations in an effort to prevent the sale of untaxed (unstamped) cigarettes to non-Indians at retail outlets on Indian reservations in the State. Pet. App. A5. Under those regulations, purchases of untaxed cigarettes may be made only by reservation retailers, Indian Tribes, or individual Indians who meet certain eligibility criteria and comply with state requirements governing the allocation of tax-exempt cigarettes among retail outlets on each reservation. 20 NYCRR 335.6.[2]

a. An individual Indian may purchase untaxed cigarettes only for his or her own use or consumption within the reservation. 20 NYCRR 335.6(a) and (b)(1).[3] The Indian must provide the retailer with a certificate of exemption at the time of his or her first purchase and must sign an invoice for each subsequent purchase, identifying the quantity and price. § 335.6(e) and (g).

A retailer may purchase or sell untaxed cigarettes only if it is registered with the New York Department of Taxation and Finance (Department), uses or intends to use

[2] The regulations originally were numbered as Sections 335.6 and 335.7, and are reproduced as such at Pet. App. A62-A74. They were renumbered in December 1990 as Sections 336.6 and 336.7, without substantive change. To avoid confusion, we, like the parties, use the numbering in effect at the time this suit was commenced.

[3] Although *Colville* held that a State may tax cigarette sales to Indians who are not members of the Tribe having jurisdiction over the reservation where the sales take place, 447 U.S. at 160-161, the New York cigarette tax regulations appear to exempt from taxation sales to Indians who are members of any of the New York Tribes who purchase cigarettes on any of the reservations in the State. See 20 NYCRR 335.6(b)(1), (3) and (5).

the cigarettes to make qualified sales to Indians, and takes delivery of the cigarettes on the reservation. 20 NYCRR 335.6(a), (b)(4) and (f)(3). In order to obtain a registration certificate, the retailer must demonstrate that it "has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law" (§ 335.6(f)(1)(ii)(a)); "is properly licensed or registered for any applicable taxes," such as the state sales tax (§ 335.6(f)(1)(ii)(b)); "has complied (or will comply) with any applicable tribal regulations and/or licensing procedures" (§ 335.6(f)(1)(iii)(a)); and "has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant" (§ 335.6(f)(1)(iii)(b)). The retailer must furnish an exemption certificate upon its first purchase from a wholesaler and must sign an invoice for each subsequent purchase. § 335.6(g)(1).

An Indian Tribe may purchase unstamped cigarettes only for "its own official use or consumption within such reservation, or to make qualified sales [to tax-exempt purchasers]." 20 NYCRR 335.6(d)(1)(iii). The Tribe must hold a valid exempt organization certificate issued by the Department, § 335.6(d)(1)(i), and must furnish an exemption certificate and sign invoices when it purchases tax-exempt cigarettes. § 335.6(g)(1). The Department may cancel or suspend the Tribe's authority to make such purchases it it fails to comply with the cigarette tax law or regulations. § 335.6(d)(3).

The regulations also place various requirements on wholesalers that sell to reservation retailers and Indian Tribes. The wholesaler must be an agent licensed by the Department to purchase and affix cigarette stamps. 20 NYCRR 335.7(b). The wholesaler must obtain a copy of the exemption certificate of the retailer or the Tribe before selling or delivering any untaxed cigarettes, § 335.6(g)(1), and must include in its monthly cigarette tax return a report of all such sales to Tribes, retailers, and qualified Indian consumers. § 335.6(g)(4). Finally, wholesalers (as well as retailers) of untaxed cigarettes must establish an acceptable recording-keeping system to associate invoices for individual sales with the exemption certificates initially furnished by purchasers. § 335.6(g)(3).

b. The Department of Taxation and Finance also prescribes the amount of tax-exempt cigarettes that may be sold to an Indian Tribe and the retailers on each reservation. If a Tribe "agrees with the Department to regulate, license, or control the sale and distribution" within its reservation of "an agreed upon amount of [untaxed] cigarettes," the wholesaler must obtain the Tribe's approval prior to each sale and delivery of untaxed cigarettes on the reservation. 20 NYCRR 335.7(c)(1). We understand that none of the New York Tribes has entered into such an agreement with the Department.

In the absence of such an agreement, the wholesaler must obtain the approval of the Department prior to each sale and delivery. 20 NYCRR 335.7(c)(2). Approval "will be based upon evidence of valid purchase orders received by the [wholesaler]" for quantities of cigarettes that the Department finds to be "reasonably related" to the "probable demand" of the qualified Indian consumers in the "trade territory" of the registered retailer (or of the Tribe, if it chooses to make qualified retail sales). § 335.7(d)(1). The Department intends to implement these allocation provisions by issuing coupons to registered retailers entitling them to purchase a predetermined quantity of tax-exempt cigarettes. At the time of delivery, the retailer would submit the coupon to the wholesaler, which would then transmit a copy to the Department. Pet. Br. 12-13.

In determining "probable demand," the Department will consult with the Tribe concerned, but only if the Tribe "regulates, licenses or controls the sale and distribution of cigarettes within its reservation." 20 NYCRR 335.7(d)

(2)(i).[4] In the consultation process, the Tribe may submit evidence of previous sales to qualified Indian consumers, average consumption by Indian consumers on and near the reservation, or tribal enrollment. *Ibid.* If the Tribe does not regulate (or submit evidence), the Department will calculate probable demand based upon the average per capita consumption of cigarettes in New York, multiplied by the number of enrolled members of the affected Tribe (or, if membership data are not available, the population in the reservation service area, as determined by the Bureau of Indian Affairs). § 335.7(d)(2)(ii).

The regulations take a similar approach with respect to the Department's determination of a retail outlet's "trade territory." If the Tribe regulates the sale and distribution of cigarettes, the Department will consult with the Tribe. 20 NYCRR 335.7(d)(3)(i). If the Tribe does not regulate (or submit evidence), the Department will "calculate such trade territory based upon the information at its disposal." § 335.7(d)(3)(ii). The Department will also "take into consideration" any evidence submitted by a registered reservation retailer. § 335.7(d)(4).

4. a. Respondents filed this action in state court to enjoin petitioners from applying the New York cigarette tax regulations to their businesses. Respondents alleged that the cigarette tax scheme was preempted by the Indian Trader Statutes because it imposed limitations and burdens on their sales to Indians who are reservation retailers. The Supreme Court for Albany County granted

[4] The St. Regis Mohawk Tribe of the St. Regis Reservation has adopted a tobacco ordinance that specifically governs the sale of cigarettes. In addition, we have been informed by the Department of the Interior that the Tonowanda Band of Seneca Indians and the Tuscarora Indian Nation have unwritten policies concerning the sale of cigarettes. Although these three Tribes have chosen to regulate in the exercise of their inherent sovereign authority, they have not entered into agreements with the Department of Taxation and Finance to do so under 20 NYCRR 335.7(c)(1).

summary judgment in favor of respondents and entered injunctive relief. Pet. App. A28-A32, A33-A43.

The Appellate Division affirmed. Pet. App. A19-A24, A25-A27. Although it believed that the burden the tax scheme imposed on respondents was "only minimal," *id.* at A24, it concluded that, under precedent of the New York Court of Appeals interpreting this Court's decision in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Indian Trader Statutes leave "no room" for state tax schemes that impose additional burdens on Indian Traders. *Id.* at A22 (quoting *Herzog Bros. Trucking, Inc.* v. *State Tax Comm'n*, 69 N.Y.2d 536, 546 (1987), vacated and remanded, 487 U.S. 1212 (1988)).[5]

After the New York Court of Appeals denied review, 78 N.Y.2d 858 (1991), petitioners sought review in this Court. The Court granted the petition, vacated the judgment of the Appellate Division, and remanded for further consideration in light of *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). See 112 S. Ct. 926 (1992) (Pet. App. A17-A18).

b. On remand, the Appellate Division sustained the tax scheme. Pet. App. A13-A16. It first quoted (*id.* at A15) this Court's observation in *Potawatomi* that "States may

[5] *Herzog* involved the Department's motor fuel tax regulations, which were the model for the cigarette tax regulations at issue in this case. While the State's certiorari petition in *Herzog* was pending in this Court, the Department proposed modifications to its motor fuel regulations to address some of the preemption problems. This Court granted the State's certiorari petition, vacated the judgment of the New York Court of Appeals, and remanded "for further consideration in light of proposed regulations formally published for comment by the Commissioner of Taxation and Finance of the State of New York on March 8, 1988." 487 U.S. 1212 (1988). On remand, the Court of Appeals adhered to its prior ruling regarding the earlier version of the regulations. It did not address the new version, because it determined that Herzog Brothers did not intend to continue sales to Indians, and that any ruling on the proposed regulations would therefore constitute an advisory opinion. *Herzog Bros. Trucking, Inc.* v. *State Tax Comm'n*, 72 N.Y.2d 720, 725 (1988). The court also noted that the State and the Indian Tribes were negotiating to resolve the matter. *Ibid.*

of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation * * * or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514. Then, without discussing specific provisions of the tax scheme or the burdens it imposed, the court found the burdens minimal and therefore not preempted. Pet. App. A16.

c. The New York Court of Appeals reversed. Pet. App. A3-A12. It concluded that, notwithstanding the intervening decision in *Potawatomi*, this case continued to be controlled by the holding in *Herzog* that the Indian Trader Statutes leave no room for States to impose any burdens on Indian Trader wholesalers. In the Court of Appeals' view, the language in *Potawatomi* on which the Appellate Division relied merely suggested possible remedies when a State is seeking to collect taxes due on past sales, and did not authorize the State to require precollection of taxes that non-Indian consumers would pay on future sales. Pet. App. A10-A11.

The Court of Appeals further held that "[t]o the extent that the Supreme Court's decisions in *Moe*, *Colville* and *Potawatomi* may be read as validating the imposition of minimal burdens on Indian retailers and Indian traders, we conclude that the tax regulations at issue here impose *significant* burdens on the wholesaler." Pet. App. A11. The court noted that the regulations "dictate to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade," and it believed that because a wholesaler must prepay taxes on all cigarettes delivered to a reservation in excess of the state-determined amount, the tax scheme "imposes a sales tax on Indian retailers." *Ibid.* For these reasons, the court concluded (*id.* at A11-A12) that the scheme attempts to regulate an area "which Congress has taken 'fully in hand'" (quoting *Warren Trading Post*, 380 U.S. at 690); undermines the purpose of the Indian Trader Statutes to "comprehensively * * * regulate businesses selling goods to reservation Indians" (quoting *Colville*, 447 U.S. at 155); interferes with the authority of the Department of the Interior to determine "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians" (quoting 25 U.S.C. 261); and imposes financial burdens on respondents and the Indians with whom they deal, thereby creating the potential to "disturb and disarrange" the plan of the Indian Trader Statutes to protect Indians from unfair prices (quoting *Warren Trading Post*, 380 U.S. at 691). The court concluded: "Manifestly, the tax regulations before us regulate trade with Indians to a significant degree. As such, they are barred by Federal preemption and cannot be applied to cigarette wholesale dealers involved in trading with Indians on reservations located in New York State." Pet. App. A12.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. This case is governed by straightforward propositions established by the Court's prior decisions. First, under general principles barring state taxation of reservation Indians—as well as this Court's decisions specifically concerning cigarette taxes—New York may not tax sales of cigarettes by reservation retailers to tribal members. See *Moe* v. *Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). Second, under *Moe* and its progeny, the State does, by contrast, have the authority to tax sales made to non-members of the Tribe.

Third, and again under *Moe* and its progeny, a State's cigarette tax scheme may impose certain minimal burdens on a reservation Indian retailer: (1) to collect the cigarette tax from its non-member customers and remit the tax to the State, and (2) to keep records of its tax-exempt sales to tribal members. It follows *a fortiori* that a State may

impose comparable burdens on non-Indian wholesalers residing off the reservation: (1) to collect from reservation retailers the state tax due on cigarettes the retailers will sell to non-members, and (2) to maintain records of their tax-exempt sales to retailers.

Fourth, *Moe* and *Colville* establish that the State may provide for precollection of its tax, either by requiring the wholesaler to purchase stamps from the State and then collect the tax from the Indian retailers (who will in turn collect the tax from their non-member customers), or by requiring the Indian retailer to purchase stamps directly from the State and affix them to cigarette packs before they are sold to non-members. The Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, and the regulations implementing those Statutes, 25 C.F.R. Pt. 140, do not pose an independent barrier to such a precollection scheme—at least in the absence of a showing (lacking here) that it imposes an undue burden on Indian retailers or on commerce with the Indians. The effect is simply to pass through the chain of distribution a valid cost associated with the sale of a particular product handled by an Indian retailer that deals with non-Indians.

For the foregoing reasons, we disagree with the initial holding of the New York Court of Appeals: that the cigarette tax regulations are preempted because the Indian Trader Statutes leave no room for state regulation and bar even the "minimal burdens" of precollection and record-keeping on respondents' commerce with reservation Indian retailers. See Pet. App. A7-A11. If those were the only measures New York had adopted, reversal of the judgment below would be warranted.

II. New York, however, has done much more. Through a complex system of registration, quotas, coupons, and state-designated "trade territories" on Indian reservations, the Department of Taxation and Finance has instituted a program of direct state regulation of the distribution of cigarettes by Indian Trader wholesalers to Indian Tribes and reservation Indian retailers. That

regulatory scheme conflicts with the Indian Trader Statutes, which assign to the Department of the Interior the "sole power and authority to appoint traders to the Indian tribes and to make * * * rules and regulations * * * specifying the kind and quantity of goods * * * [to] be sold to the Indians." 25 U.S.C. 261.

In addition, the requirement that Indian retailers obtain a registration certificate from the State in order to make tax-exempt sales of cigarettes to Indian consumers transgresses established limitations, derived from Indian treaties and statutes and the backdrop of Indian sovereignty, on the regulatory authority of the States. Other aspects of the State's regulatory scheme—the requirement that Indian Tribes hold a valid exemption certificate from the State, the subordination of the Tribe's regulatory power if it does not enter into an agreement with the New York Department of Taxation and Finance, and the requirement that Indian retailers comply with tribal cigarette tax laws as a condition to obtaining permission from the State to sell cigarettes free of state taxation—are preempted for the additional reason that they directly interfere with tribal sovereignty.

We therefore agree with the alternative holding by the New York Court of Appeals: that the cigarette tax regulations are preempted as applied to respondents' sales to Indian retailers because the regulations "impose *significant* burdens" and "regulate trade with Indians to a significant degree." Pet. App. A11-A12. The judgment of the Court of Appeals therefore should be affirmed.

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New York defends its regulatory scheme on the ground that it was designed to prevent the loss of revenue resulting from widespread sales of cigarettes to non-Indians on reservations in the State without payment of taxes. See Pet. Br. 10-11 & n.4. That loss of revenue, however, appears to be attributable in large measure to the combination of two mistaken legal positions: the position of

some New York Tribes and many Indian retailers that the New York Tribes' treaties with the United States exempt them from the rule of *Moe* that the State may collect (and precollect) taxes on reservation sales to non-Indians (see Seneca Nation *et al.* Amici Br. Pet. Stage; *Snyder* v. *Wetzler*, 1993 WL 463277, at *1-*3 (N.Y. App. Div. Nov. 10, 1993)), and the position of respondents and other wholesalers and retailers that the Indian Trader Statutes absolutely bar the State from imposing any duty of precollection on wholesalers that sell cigarettes to reservation Indian retailers (see *id.* at *3-*4). If, as we urge, those propositions are rejected—and if the State should in the future impose only precollection and r ord-keeping requirements of the sort sustained in *Moe* and *Colville*, without the market allocation features of the regulations challenged here—the retailers, wholesalers, and Tribes should be given a reasonable opportunity to conform their operations to those new regulations.[6]

Once the governing rules are clear, there is reason to anticipate that the Tribes and the State would enter into compacts or otherwise reach agreement on the logistics of tax collection and remittance. Such arrangements have been worked out in other States.[7] For example, after this

[6] If the wholesalers, retailers, and Tribes do not conform their conduct, other measures may be available. The State could seize unstamped cigarettes off the reservation or assess wholesalers who supplied unstamped cigarettes to reservation retailers for sale to non-Indians. *Potawatomi*, 498 U.S. at 514.

[7] Some compacts provide for state collection of taxes (including tribal taxes) and remittance by the State to the Tribe of a mutually agreed upon fixed percentage of revenues in lieu of the exact amount imposed by tribal taxes. *E.g.*, Tax Collection Agreement Between the Standing Rock Sioux Tribe and the Department of Revenue of the State of South Dakota (Feb. 25, 1991). Other compacts provide for the Tribes to apply for refunds from the State of the taxes precollected on cigarettes sold to Indians, as well as the refund of an agreed-upon portion of the taxes on cigarettes sold to non-Indians. *E.g.*, Agreement Between the Shakopee Mdewakanton Indian Community of the Minnesota Sioux and the Minnesota Department of Revenue Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 25, 1988); Agreement Between the Stockbridge-Munsee Community and the Wisconsin Department of Revenue Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 25, 1988). A third type of compact provides for tribal payment of an agreed upon percentage (*e.g.*, 25%) of state taxes on all tribal cigarette purchases without reference to the tribal membership or non-membership status of the purchasing public. *E.g.*, Tribal/State Tobacco Tax Compact Between the Cherokee Nation and the State of Oklahoma (June 8, 1992); Potawatomi/Oklahoma Tobacco Tax Compact (Jan. 4, 1993). Several States have enacted legislation specifically authorizing such compacts and/or providing for similar alternative tax collection schemes. See, *e.g.*, Nev. Rev. Stat. Ann. §§ 370.280 (Michie 1986), 370.515 (Michie Supp. 1991); Okla. Stat. Ann. tit. 68, §§ 346 *et seq.*, 424 *et seq.* (West Supp. 1994); Wis. Stat. Ann. §§ 139.323, 139.325 (West 1989).

Court made clear in *Potawatomi* that the principles of *Moe* apply in Oklahoma—and pointed out that States have alternatives to suits against Tribes to enforce their tax codes, such as "enter[ing] into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax," 498 U.S. at 514—the Citizen Band Potawatomi Tribe entered into a compact with Oklahoma. See note 7, *supra*. In addition, the Department of the Interior could adopt regulations under the Indian Trader Statutes to facilitate resolution of tax and other issues arising between Indian Traders and the State.[8] "And if [New York] and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress." *Potawatomi*, 498 U.S. at 514.

[8] The Department of the Interior is considering the adoption of regulations addressing Indian Trader issues in New York by, *e.g.*, providing a role for the Tribes under the Indian Trader regulations in regulating retail business, including the sale of cigarettes. See 58 Fed. Reg. 56,504 (Oct. 25, 1993).

ARGUMENT

I. NEW YORK MAY REQUIRE PRECOLLECTION OF TAXES ON RESERVATION SALES OF CIGARETTES BY INDIAN RETAILERS TO NON-INDIANS, AND MAY IMPOSE MINIMAL BURDENS ON INDIAN TRADERS INCIDENT TO THE COLLECTION OF THAT TAX

A. New York May Not Tax On-Reservation Sales Of Cigarettes To Tribal Members

It is undisputed in this case that New York may not impose its cigarette tax on sales to tribal members on their reservation. " '[A]bsent cession of jurisdiction or other federal statutes permitting it,' * * * a State is without power to tax reservation[] lands and reservation[] Indians." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992) (citation omitted). Because "the ultimate incidence of and liability for" the New York cigarette tax "shall be on the consumer" (N.Y. Tax Law §471.2 (McKinney 1987)), *Moe* establishes that the tax may not be imposed when the consumer is a tribal member. 425 U.S. at 480-481. In reaching that result in *Moe*, the Court relied on *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), which applied general principles barring state taxation of Indians to invalidate a state tax imposed on reservation income earned by an individual Indian. See 425 U.S. at 475-477, 480-481. But the cigarette tax in *Moe* presumably was also invalid under the Indian Trader Statutes, because it had the effect of increasing the price the Indian retail customers paid to purchase goods from an Indian Trader. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 164 n.3, 165-166 (1980).

B. *Moe* And Its Progeny Permit A State To Tax Cigarette Sales By Indian Retailers To Non-Members And To Require Precollection Of The Tax And Incidental Record-Keeping

Although on-reservation sales to tribal members are immune from state taxation, this Court has held on four separate occasions that a State does have authority to impose its cigarette tax on sales to non-members if state law places the incidence of the tax on the ultimate consumer. *Moe*, 425 U.S. at 481-483; *Colville*, 447 U.S. at 142 n.9, 150-151, 159; *Chemehuevi*, 474 U.S. at 11-12; *Potawatomi*, 498 U.S. at 512.[9] The Court in those cases also sustained a requirement that Indian retailers collect the tax from their non-Indian customers by adding the tax to the sales price. *Moe* described that mechanism as a "simple expedient" and a "minimal burden designed to avoid the likelihood that in its absence non-Indians pur-

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[9] A State's authority to tax non-Indian purchases from Indians on a reservation is not, however, unlimited. The basis for state taxation is strongest when Indians "impor[t] a product onto the reservations for immediate resale to non-Indians," and thus are marketing a state tax exemption. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); see *Colville*, 447 U.S. at 155. But when Indians sell items or services that have value generated on the reservation by activities in which Indians have a significant interest, state taxation is preempted. *Cabazon*, 480 U.S. at 219-222; *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 983-987 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). Even in general retail establishments that stock products imported for resale, different considerations may be present if the businesses do not merely cater to off-reservation non-Indians. Compare *Colville*, 447 U.S. at 155; but see *id.* at 150 n.25; cf. *Warren Trading Post*, 380 U.S. at 691 n.18 (Buck Act, 4 U.S.C. 105 *et seq.*, which authorizes state sales and use taxes "within a Federal area," 4 U.S.C. 105(a), is inapplicable to Indian reservations); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 n.16 (1980) (same). There is no reason to consider those issues in this case, however, because the respondent wholesalers have not argued that they are exempt from precollecting the state cigarette tax on the basis of any such special characteristics of the Indian retailers to whom they sell.

chasing from the tribal seller will avoid payment of a concededly lawful tax." 425 U.S. at 482, 483.

Finally, both *Moe* and *Colville* sustained the application to Indian retailers of a provision for *precollection* of the tax prior to the retailers' sales to non-Indians. The state law in *Moe* required the retailer to prepay the tax to the wholesaler at the time of purchase, and the district court upheld that requirement. *Confederated Salish & Kootenai Tribes of Flathead Reservation* v. *Moe*, 392 F. Supp. 1297, 1308, 1311 (D. Mont. 1975) (three-judge court); see also 74-1656 J.S. App. 91 (district court judgment). The Tribes challenged the precollection requirement on appeal to this Court (74-1656 Brief for Appellees/Cross-Appellants 22-25) but the Court affirmed the judgment below, see 425 U.S. at 483, specifically noting that the district court had held that Montana "may require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes," *id.* at 468.[10]

Similarly, in *Colville*, the Court held that "the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe," because that procedure was legally indistinguishable from the collection burden permitted in *Moe*. 447 U.S. at 159. Thus, a precollection requirement is permissible whether state law requires the retailer to prepay the tax directly to the State (as in *Colville*) or to a wholesaler that has already prepaid the tax to the State (as in *Moe* and this case). *Colville* also upheld state requirements that Indian retailers keep records of their taxable and tax-exempt sales, because the retailers had failed to show that the

[10] The Court noted the district court's recognition that because the "statutory scheme contemplates advance payment or 'precollection' of the sales tax by the retailer," its holding (distinguishing between sales to Indians and sales to non-Indians) would result in "complicated problems" of enforcement by the State. The district court deferred passing on those problems pending a decision by this Court, and the Court accordingly expressed no opinion on them. 425 U.S. at 468 n.6.

requirements were not reasonably necessary to prevent fraudulent transactions. *Id.* at 159-160.

Moe and *Colville* therefore establish that burdens devolving on Indian retailers by operation of state tax law are not preempted if the measures are incidental to the State's valid and non-discriminatory exercise of taxing authority over non-Indians and impose only minimal burdens on the retailer.[11] *A fortiori*, *Moe* and *Colville* do not prohibit New York from imposing comparable burdens on non-Indian wholesalers—*e.g.*, by requiring them to prepay the tax through the purchase of tax stamps from the State, collect the tax from Indian retailers, and keep records of their sales of unstamped cigarettes to Indian retailers.

Indeed, as the Appellate Division pointed out (Pet. App. A15), this Court stated in *Potawatomi* that "States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, *supra*, at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc.* v. *Oklahoma Tax Comm'n*, 898 F.2d 122 (CA 10 1990)." 498 U.S. at 514. The New York Court of Appeals found that language inapposite here. It believed that the Court was approving only methods by which the State could collect taxes that were already due on *past* sales to non-Indians, not methods for the precollection of taxes that would be due on *future* sales. See Pet. App. A11-A12. The necessary premise of the State's authority to assess the wholesaler, however, must be that the wholesaler, solely by virtue of its sale of unstamped cigarettes to Indian retailers, assumed a duty and liability with respect to the subsequent resale of the cigarettes by the retailers to their non-Indian customers.

[11] No retailer or Tribe is a party to this case, and there has been no determination whether the record-keeping required of retailers and Tribes under the New York scheme is either unduly burdensome or not reasonably necessary to prevent fraudulent transactions. See *Colville*, 447 U.S. at 159-160.

If the State may impose and enforce a duty on the wholesaler to pay the taxes due on cigarette sales to non-Indians after the fact, there is no reason why the State should be barred from imposing and enforcing such a duty on the wholesaler at the time it sells the cigarettes to the retailer. [12]

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[12] This case presents no question of how a State might enforce its regulations against Indian retailers or Tribes on reservations, because no Indian retailers or Tribes are parties. New York has acquired civil and criminal jurisdiction over the reservations in that State pursuant to special statutes (25 U.S.C. 232, 233) that were predecessors to Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified at 25 U.S.C. 1321-1326). See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 241 (1985) (*Oneida II*). This Court has held, however, that a State that has assumed full civil and criminal jurisdiction pursuant to Public Law 280 does not thereby obtain authority to enforce its tax or general regulatory laws against Indians. See *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Cabazon*, 480 U.S. at 209-212. The special jurisdictional statutes applicable to New York have been interpreted in the same manner. See *United States* v. *Burns*, 725 F. Supp. 116, 125 (N.D.N.Y. 1989); *People of State of New York* v. *Anderson*, 671 F. Supp. 220, 224 (W.D.N.Y. 1987); *People* v. *Snyder*, 532 N.Y.S.2d 827, 830-831 (Erie County Ct. 1988); Seneca Nation *et al.* Amici Br. Pet. Stage 18.

In *Moe*, Montana had purported to acquire criminal jurisdiction over the Flathead Reservation. See 392 F. Supp. at 1306. But although the Tribes' filing of *Moe* in the district court was precipitated by the state sheriff's arrest of a tribal member for selling unstamped cigarettes (see 425 U.S. at 467), the Court did not address whether the State could enforce its tax laws directly against tribal members (see *id.* at 481-483), perhaps because *Moe* was decided prior to *Itasca County*. In *Colville*, the Court specifically declined to decide whether state officials could enter the reservation and seize cigarettes held by Indian retailers. 447 U.S. at 162. The Court likewise did not resolve any enforcement issues in *Potawatomi* (where the State had no jurisdiction pursuant to Public Law 280), although the Court reiterated the rule of *Itasca County* and *Cabazon* that Public Law 280 is not "independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations." 498 U.S. at 513. The Court did observe, however, that it had never held that individual tribal officers and agents are not liable for damages in actions brought by the State. *Id.* at 514.

The Indian Trader Statutes may also suggest limits on the remedies available to a State against Indian retailers. Although 25 U.S.C. 264

C. The Indian Trader Statutes Do Not Pose An Independent Obstacle To The Minimal Pre-Collection And Record-Keeping Burdens Sustained In *Moe* And *Colville*

The New York Court of Appeals recognized that *Moe* and *Colville* had sustained the imposition of state-law precollection and record-keeping burdens on Indian retailers. It nevertheless rejected the State's contention that it may impose comparable burdens on wholesalers "who are just one step further back [i]n the distribution chain." Pet. App. A8. The Court of Appeals found a "significant difference" in the fact that *Moe* and *Colville* involved minimal burdens imposed on Indian retailers dealing with non-Indians, while respondents present the reverse situation of non-Indians who deal with Indians. In the court's view, the Indian Trader Statutes bar imposition of even "minimal burdens" on the relationship between a non-Indian wholesaler and its Indian retailer-customers. Pet. App. A7-A8, A10-A11. That view cannot be squared with *Colville*.

In *Colville*, the on-reservation Indian retailers were licensed Indian Traders, and the district court held that, under *Warren Trading Post*, the Indian Trader Statutes barred the State from imposing record-keeping obligations on those Traders in connection with their tax-exempt sales to Indians. *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1347, 1359 (E.D. Wash. 1978) (three-judge court). The State challenged that holding in this Court, defending the duty to keep records of tax-exempt sales to Indians as a "minimal burden" and a necessary adjunct to the State's authority to require Indian retailers to collect and remit taxes on sales to non-Indians (and to prevent evasion of the tax by

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authorizes seizure of merchandise from and assessment of fines against non-Indians who violate the Indian Trader license requirement, only injunctive relief is available against Indians. *United States* v. *Parton*, 132 F.2d 886 (4th Cir. 1943) (per curiam).

non-Indians). See 78-630 Brief for Appellants 101-102; see also 78-630 Brief for Appellees 118-119 (defending district court's ruling). This Court reversed, reiterating the holding of *Moe* that "the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing th[e] tax," and concluding that the Tribes had failed to demonstrate that the record-keeping requirements for exempt sales "are not reasonably necessary as a means of preventing fraudulent transactions." 447 U.S. at 159, 160. The Court did not discuss the Indian Trader Statutes. But its reversal of the district court's holding that rested on the Indian Trader Statutes (against the background of the parties' arguments addressed to those Statutes) should, in our view, be understood as a holding that the Indian Trader Statutes do not bar the imposition of all "minimal burdens" in connection with Indian Traders' sales to Indians.

Moreover, as explained above (see page 16, *supra*), *Moe* sustained a provision that Indian retailers were required to prepay the tax to the wholesaler. That holding necessarily assumed that the Indian Trader wholesaler would have a duty to collect the tax from the Indian retailers and remit it to the State. Indeed, under the scheme in *Moe*, the wholesaler would *already* have prepaid the tax to the State by the time it sold the cigarettes to the Indian retailers and collected the tax from them. Although the Court did not specifically address the question whether the Indian Trader Statutes bar imposition of such a burden on the non-Indian wholesaler, the clear implication is that they do not. As the Court recognized in *Moe* itself, 425 U.S. at 482, the purpose of the Indian Trader Statutes is to protect Indian purchasers; the protections afforded the Indian Trader are derivative of that purpose. *Central Machinery*, 448 U.S. at 163; *Warren Trading Post*, 380 U.S. at 691. If, as the Court held in *Moe*, the State may impose a prepayment duty on the Indian retailer in connection with the distribution of cigarettes destined for non-Indian consumers, then the

Indian Trader Statutes should not be construed to afford the non-Indian wholesaler an independent immunity from the same duty.[13]

The state cigarette tax is one lawful component of the total price paid by a non-Indian who purchases cigarettes from an Indian retailer. The prepayment and collection duties imposed on Indian retailers and their non-Indian wholesalers are simply the mechanism for passing that component through the chain of distribution—in the same manner as other components of the price to the ultimate consumer (*e.g.*, costs incurred by the manufacturer, wholesaler, and retailer) are passed along. The existence of an Indian retailer in the chain of distribution from a non-Indian wholesaler to a non-Indian consumer does not stand as a barrier to that pass-through. Just as Indian retailers may not market to non-Indians an exemption from state taxation, *Colville*, 447 U.S. at 155, non-Indian wholesalers may not market such an exemption through Indian retailers.

D. The Treaties Between The United States And The New York Indian Tribes Do Not Render Inapplicable The Rule Of *Moe* That States May Tax Cigarette Sales To Non-Indians

Respondents have not disputed that the general principles of *Moe*—which permit a State to tax cigarette sales by Indian retailers to non-Indians and to require precollection of the tax—apply in New York State. Several New York Indian Tribes, however, have filed a

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[13] The Court in *Moe* did specifically reject the contention that, because the retailer was itself an Indian Trader in its sales to Indian customers, the Indian Trader Statutes and *Warren Trading Post* barred the State from imposing the collection burden on the Indian retailer. The Court reasoned that the tax challenged in *Warren Trading Post* was imposed directly on the Indian Trader and was based on its sales to Indians, while in *Moe* the incidence of the tax was on the non-Indian purchasers and was measured by the volume of the retailer's sales to such purchasers. 425 U.S. at 482.

brief as amici curiae contending that the treaties between the United States and the New York Tribes distinguish them for present purposes from Tribes elsewhere in the United States and render the principles of *Moe* inapplicable on their reservations. See Seneca Nation *et al.* Amici Br. Pet. Stage 4-9, 14-17. The Tribes made the same argument in the New York Court of Appeals. That court did not specifically address the Tribes' argument, although its opinion appears to assume that *Moe* permits New York to tax sales to non-Indians and to require Indian retailers to collect the taxes. See Pet. App. A8-A9, A10. Moreover, the Appellate Division recently rejected the same treaty-based argument in a challenge by an Indian retailer to the application of the New York cigarette tax to his sales to non-Indians. See *Snyder* v. *Wetzler*, 1993 WL 463277, at *1-*3. We agree with that ruling.

The Tribes first rely (Br. Pet. Stage 7-8) on language in three early treaties with the Six Nations. They point out that Article III of the Treaty of Fort Stanwix (1784), 7 Stat. 15, provided that the Nations "shall be secured in the peaceful possession of the lands they inhabit"; that Article I of the Treaty of Fort Harmar (1789), 7 Stat. 33, provided that the lines fixed by the Treaty would remain the boundary between the six Nations and the United States "forever" and that the United States relinquished its claim to those lands; and that Article III of the Treaty of Peace of Canandaigua (1794), 7 Stat. 45, provided that the United States would never disturb the Senecas in the "free use and enjoyment" of their lands. See *Oneida II*, 470 U.S. at 231. Those passages do not address the subject of state taxing and other jurisdiction over non-Indians within the territories of the Six Nations. Nor, contrary to amici's suggestion (Br. Pet. Stage 9-13), does the relevant language in the treaties and statutes protecting the use and occupancy of the reservations in *Moe*, *Colville* and *Potawatomi* appear to afford those Tribes less protection

than is afforded the New York Tribes.[14] Accordingly, the three early treaties with the Six Nations do not suggest that the principles applicable to state taxing and other jurisdiction over non-Indians on reservations in New York differ from those applicable on reservations elsewhere in the United States. Compare *New York ex rel. Ray* v. *Martin*, 326 U.S. 496, 500-501 (1946) (the rule of *United States* v. *McBratney*, 104 U.S. 621 (1881), under which a State has jurisdiction over a crime committed by one non-Indian against another on a reservation, applies in New York, notwithstanding the Treaty of Canandaigua).

Article 9 of the Treaty of Buffalo Creek (1842), 7 Stat. 590 (see Tribes' Amici Br. Pet. Stage 8-9, 10-13)), likewise does not have a preemptive force that is broader for present purposes than that of the western treaties. Article 9 provides that such "lands" as may remain in the possesion of the Senecas are protected "from all taxes, and assessments for roads, highways, or any other purpose." As the Appellate Division observed in *Snyder* v. *Wetzler*,

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[14] Amici Tribes assert (Br. Pet. Stage 9) that a distinction is warranted because the western Tribes were "defeated in battle" and forced to relinquish title to their lands. There are numerous difficulties with that asserted distinction. First, as was recognized in the Treaty of Fort Stanwix, most of the Six Nations of the Iroquois in New York were aligned during the Revolutionary War with the British, who were "defeated in battle." See *Oneida II*, 470 U.S. at 231. Second, not all of the Tribes in the western part of the country were defeated in battle with the United States, and some obtained fee simple title as absolute as that of the Six Nations. See, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). Third, even without the sort of explicit recognition of title that the Senecas obtained in Article III of the Treaty of Canandaigua, the western Tribes that entered into treaties with the United States obtained well-recognized rights in their reservations that would appear to be as strong as those of the New York Tribes. See *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497-498 (1937); *Felix S. Cohen's Handbook of Federal Indian Law* 472 (1982 ed.) (describing various sources of Indian title). Fourth, it is not evident why Congress would have intended the nature of a Tribe's property rights to affect the extent to which a State could apply its tax laws to non-Indians on reservation lands.

1993 WL 463277, at *1-*2, that language is limited to taxes assessed against the land itself. It does not, on its face, address the distinct question of the extent to which the State may assess its sales tax against non-Indians who engage in transactions with Indians on those lands.[15] See *Yakima*, 112 S. Ct. at 692-693 (distinguishing taxes on land from other taxes). The validity of other state taxes imposed on Indians and non-Indians therefore should instead be resolved under the general preemption principles this Court has developed. In any event, whatever the preemptive force of the Treaty of Buffalo Creek in other contexts, there is no reason to believe that it is any greater in the present setting than that of the Indian Trader Statutes.

II. THE NEW YORK CIGARETTE TAX SCHEME IS NEVERTHELESS INVALID AS APPLIED TO RESPONDENTS BECAUSE IT DIRECTLY REGULATES AND SUBSTANTIALLY BURDENS THE DISTRIBUTION AND SALE OF CIGARETTES TO INDIANS

For the reasons stated in Point I, *Moe* and its progeny permit—and the Indian Trader Statutes do not forbid—a State to tax the sale of cigarettes by an Indian retailer to non-Indians, and to impose on retailers and Indian Trader wholesalers the minimum burdens of prepaying the tax and maintaining records of taxable and tax-exempt sales. But the regulations issued by the New York Department of Taxation and Finance go much further. They pervasively regulate commerce in cigarettes among wholesalers,

[15] The Tribes also rely (Br. Pet. Stage 14-17) on *The New York Indians*, 72 U.S. (5 Wall.) 761, 766-771 (1867). That case, however, invalidated state taxes assessed on reservation lands owned by the Indians. It did not speak to the validity of taxes imposed on non-Indians. Moreover, the *The New York Indians* did not state a rule unique to the New York Tribes; rather, the Court applied (see *id.* at 769-770) the general principles it had announced earlier the same Term in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). See also *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764-765 (1985).

reservation retailers, Tribes and tribal members. The judgment of the New York Court of Appeals invalidating the regulations therefore should be affirmed.

The Constitution expressly confers on Congress the power to regulate "Commerce * * * with the Indian Tribes." Art. 1, § 8, Cl. 3. That provision was intended to vest exclusive control in the national government over commerce with the Indians, and thereby to eliminate the difficulties that had arisen as a result of competing assertions of authority by Congress and the States under the ambiguous terms of Article IX of the Articles of Confederation. See *Oneida II*, 470 U.S. at 234 n.4; *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-559 (1832); *The Federalist* No. 42, at 284 (J. Madison) (J. Cooke ed. 1961).

Congress enacted the Indian Trader Statutes pursuant to its exclusive power under the Indian Commerce Clause. The first version was passed in 1790 (see Act of July 22, 1790, ch. 33, 1 Stat. 137), and such statutes have been carried forward to the present day to prevent "fraud and imposition" on the Indians. See *Central Machinery*, 448 U.S. at 163 (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834)). Consistent with the origins of Congress's power over Indian Commerce, this Court has held that, by enacting the Indian Trader Statutes, Congress "has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." *Central Machinery*, 448 U.S. at 166 (quoting *Warren Trading Post*, 380 U.S. at 691 n.18).

The Indian Trader Statutes place in the Commissioner of Indian Affairs the "sole power and authority" to appoint Indian Traders and "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. 261. The Commissioner in turn has promulgated "detailed regulations." *Warren Trading Post*, 380 U.S. at 689; see 25 C.F.R. Pt. 140. The

Statutes and regulations govern qualifications for traders (25 C.F.R. 140.9), the inspection of records to ensure "fair and reasonable" prices (25 C.F.R. 140.22), trading by government employees (25 C.F.R. 140.5), places where trade may be conducted (25 C.F.R. 140.14), the sale of tobacco and alcohol (25 C.F.R. 140.17, 140.18), prohibitions against gambling, the sale of drugs, and trade in antiquities and infectious plants (25 C.F.R. 140.19, 140.21, 140.25, 140.26), credit (25 C.F.R. 140.23), payments to Indians (25 C.F.R 120.24), and penalties for violations (25 U.S.C. 264; 25 C.F.R. 140.3). These "apparently all-inclusive regulations," together with the statutes authorizing them, are "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Central Machinery*, 448 U.S. at 163-164 (quoting *Warren Trading Post*, 380 U.S. at 690).

The New York cigarette tax regulations conflict with the foregoing principles in a number of respects. First, the requirement that a retailer obtain a certificate of registration from the State in order to purchase tax-exempt cigarettes from a wholesaler and sell those cigarettes to tribal members is flatly inconsistent with Congress's specification that the Commissioner of Indian Affairs shall have the "sole power and authority" to appoint Indian Traders (25 U.S.C. 261), and that any person desiring to trade with the Indians who establishes "to the satisfaction of the Commissioner of Indian Affairs" that he is a "proper person" may be permitted to do so under such rules and regulations as the Commissioner may prescribe (25 U.S.C. 262; 25 C.F.R. 140.1).[16] The federal statutory

[16] A license applicant must furnish personally identifying information and information about the business, its location, the capital to be invested, the names of employees, and the business experience of the applicant. 25 C.F.R. 140.9(a). In addition, the applicant must submit two testimonials about his character, the character of his employees "and their fitness to be in the Indian country." *Ibid.* Special provisions are made for issuance of licenses for "[i]tinerant peddlers or purveyors of foodstuffs and other merchandise." 25 C.F.R. 140.9(b). At the time of a proposed license renewal, "the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license." 25 C.F.R. 140.12.

scheme leaves no room for the additional licensing requirement imposed by New York pursuant to 25 NYCRR 335.6(f)(1), under which the trader must establish to the satisfaction of the New York Department of Taxation and Finance that it meets additional eligibility standards.[17]

Indeed, as applied to reservation retailers who are Indians, the state registration requirement is invalid on independent grounds. In *Moe*, the district court held that a state licensing requirement for cigarette vendors could not be applied to Indian retailers on the reservation under the principles of *McClanahan* that bar the application of state regulatory law to reservation Indians, 392 F. Supp. at 1300, 1307, 1317; 74-1656 J.S. App. 91 (district court judgment), and this Court affirmed that judgment, 425 U.S. at 480-481, 483.[18] By contrast, in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Court sustained a requirement that a reservation Indian retailer obtain a state license in order to sell liquor only because it concluded that Congress had authorized application of the licensing requirement when it enacted 18 U.S.C. 1161. See 463 U.S. at 725-735; see also *id.* at 734 n.18 (relying on authorization in 18 U.S.C. 1161

[17] Significantly, in *Worcester* v. *Georgia*, the seminal decision in this Court's Indian jurisprudence, the Court invalidated a state licensing requirement for a non-Indian whose activities in Indian territory were authorized under federal law. 31 U.S. (6 Pet.) at 528-529, 542, 561-562.

[18] At page 480 of the opinion, the Court stated that application of the "vendor license fee" conflicted with *McClanahan*. However, as explained in the text, the judgment of the district court that this Court affirmed barred application of any licensing requirement, not just the fee. The Court's reference to the "vendor license fee" therefore presumably was intended to embrace the licensing requirement in its entirety.

in rejecting argument that state licensing requirement was inapplicable under *Warren Trading Post* because the Indian retailer was a licensed Indian Trader).[19]

In addition, the Indian Trader Statutes preempt the provisions of the New York cigarette tax regulations and implementing measures (see Pet. Br. 12-13) that institute a complex scheme of state regulation of the distribution of tax-exempt cigarettes by (1) establishing state-determined quotas of tax-exempt sales on each reservation, (2) allocating each reservation's overall quota among its retail outlets based on a determination by the Department of Taxation and Finance of the "probable demand" for cigarettes by individual Indians within what the Department finds to be the "trade territory" for each outlet, (3) enforcing the allocation scheme through a system of coupons issued to retailers entitling them to purchase a specified amount of tax-exempt cigarettes from wholesalers, and (4) requiring a wholesaler to obtain the prior approval of the Department for each sale and delivery of a specified quantity of tax-exempt cigarettes to a retailer. See 20 NYCRR 335.7(c) and (d). These provisions conflict with the Indian Trader Statutes' vesting in the Commissioner of Indian Affairs of the "sole power and authority * * * to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods * * * [to] be sold to the Indians." 25 U.S.C. 261. "[N]o room

[19] In a related vein, the requirement that an Indian Tribe hold a lawful certificate of tax exemption from the State in order to purchase tax-exempt cigarettes (see 20 NYCRR 335.6(d)(1)(i)) is inconsistent with *McClanahan* and principles of tribal sovereignty. Cf. *Hancock* v. *Train*, 426 U.S. 167 (1976). Similarly, in the absence of an agreement between the State and the Tribe authorizing the State to assist in enforcing tribal law, the requirement in the New York cigarette tax regulations that a reservation retailer establish that it is in compliance with *tribal* law in order to obtain a *state* permit (see 20 NYCRR 335.6(f)(1)(iii)) impinges upon tribal sovereignty. The measures that should be taken to enforce tribal law, and the consequences for failure to comply, are, in the first instance, matters for the Tribe to decide. See *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

remains for state laws imposing additional burdens upon traders." *Warren Trading Post*, 380 U.S. at 690.[20]

These measures would also greatly burden Indian commerce as a practical matter. An Indian retailer has no guarantee of a designated "trade territory" commensurate with its market share. Although the regulations indicate that information provided by retailers and Tribes would be considered by the state regulators, 20 NYCRR 335.7(d)(3)(i) and (4), there are no standards for doing so.[21] Such state control would also chill efforts by retailers to expand their market shares, interfere with free competition among retailers on the same reservation, and supplant bargaining between retailers and wholesalers over quantity and price, especially to the extent prices are determined by volume of sales or size of shipment. The requirement that the State approve each sale or delivery in advance would undermine the competitive process for similar reasons.[22] And the allocation system would impermissibly burden individual

[20] The Indian Trader Statutes also preempt the regulations' requirement that a retailer take delivery of unstamped cigarettes on the reservation in order to be permitted to make tax-exempt retail sales to individual Indians. See 20 NYCRR 335.6(f)(3)(ii).

[21] The regulations provide for the Department to consider input from the Tribe on the issues of "probable demand" and "trade territory" for reservation outlets only if the Tribe regulates the distribution and sale of cigarettes on its reservation. This limitation fails to respect the sovereign status of a Tribe that, in the exercise of its inherent powers, has elected to leave the distribution of cigarettes unregulated.

[22] The requirement that the Department approve each sale and delivery in advance does not apply where the Tribe concerned enters into an agreement with the Department for the regulation of the sale and distribution of an "agreed upon amount" of tax-exempt cigarettes on the reservation. 20 NYCRR 335.7(c)(1). If the Tribe does not enter into such an agreement (and no New York Tribe has done so), its regulatory authority is subordinated to that of the State. Moreover, even if the Tribe enters into such an agreement, the regulations require a wholesaler to obtain the prior approval of the Tribe before making any sale or delivery on the reservation (*ibid.*), whether or not the Tribe, in the exercise of its sovereign power, would choose to adopt a prior approval requirement. These regulatory provisions are inconsistent with principles of tribal sovereignty.

Indian consumers by restricting the locations at which they are able to purchase tax-exempt cigarettes.[23]

By placing significant restrictions on transactions between retailers and Indian purchasers of cigarettes that are exempt from taxation as a matter of federal law, the New York regulations place direct burdens on "commerce that would exist on the reservations without respect to the tax exemption." *Colville*, 447 U.S. at 157. Moreover, by erecting a special regulatory scheme governing only the distribution and sale of cigarettes to Indians, the State unduly discriminates against Indian commerce. The regulations therefore are invalid under the Indian Commerce Clause, *Colville*, 447 U.S. at 157, as well as under the Indian Trader Statutes and the principles of *McClanahan*.

[23] The regulations also significantly burden individual Indian consumers and Indian commerce by permitting retail sales only to Indians who purchase the untaxed cigarettes for their own use or consumption on the reservation. 20 NYCRR 335.6(b)(1)(ii). Tribal members may not give the cigarettes away, sell them to another tribal member, or possess them elsewhere in the State, and they are thus restricted in their possession and use of the cigarettes long after the transaction that is the subject of the tax has been completed.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Indian Trader Statutes, 25 U.S.C. 261 *et seq.*, provide as follows:

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

2. 25 C.F.R. Pt. 140 provides as follows:

§ 140.1 Sole power to appoint.

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 140.2 Presidential prohibition.

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the

country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

§ 140.3 Forfeiture of goods.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chicasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

§ 140.5 Bureau of Indian Affairs employees not to contract or trade with Indians except in certain cases.

(a) Definitions of terms as used in this part:

(1) "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

(2) "Bureau" or the "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the Assistant Secretary for Indian Affairs, both in the Department of the Interior.

(3) "Employee" means an officer, employee, or agent of the Bureau of Indian Affairs.

(4) "Secretary" means the Secretary of the Interior.

(5) "Contract" means any agreement made or under negotiation with any Indian for the purchase, transportation or delivery of goods or supplies.

(6) "Trading" means buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services.

(7) "Commercial trading" means any trading transaction where an employee engages in the business of buying or selling services or items which he/she is trading.

(b) With the exceptions provided in subsection (b) of section 437 of title 18 U.S. Code, section 437 provides that whoever, being an officer, employee, or agent of the Bureau of Indian Affairs, has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of another person where such officer, employee, or agent benefits or appears to benefit from such interest:

(1) In any contract made or under negotiation with any Indian, for the purchase, transportation or delivery of goods or supplies for any Indian, or

(2) In any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined not more than $5,000 or imprisoned not more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

(c) The further subsections of this section authorize certain employees contracting and trading with Indians as authorized by the exceptions in section 437 of title 18 U.S.

Code. All such contracting and trading is subject to the express provision of section 437 that none of the sales or purchases so authorized may be made if the purpose of any such sale, trade, or purchase is that of commercially selling, reselling, trading, or bartering such property.

(d)(1) Under authority granted by section 437(b)(1) of title 18 U.S. Code, employees of the Bureau of Indian Affairs may with the approval of an authorized officer of the Bureau, as designated in paragraph (d)(2) of this section, purchase from or sell to an Indian any service or any real or personal property, not held in trust by the United States or subject to a restriction against alienation imposed by the United States, or any interest in such property. In addition, employees may purchase from Indians without approval from an authorized officer of the Bureau any non-trust or unrestricted personal property for home use or consumption the value of which property does not exceed $1000. Where the purchase or sale price is less than $1,000, employees may also purchase motor vehicles for their personal use from Indians or sell their personal motor vehicles to Indians without obtaining approval of such purchases or sales from an authorized officer of the Bureau. Approval must be obtained if the purchase or sale price is $1,000 or more.

(2) As used in paragraph (d)(1) of this section an authorized officer of the Bureau of Indian Affairs for employees on reservations and in agencies or in field service units shall be the superintendent or other officer in charge of the unit in which the employee is employed. The authorized officer for the superintendent or officer in charge is his or her immediate supervisor. The authorized officer for employees in area offices is the Area Director, and the authorized officer for an Area Director is his or her immediate supervisor. The authorized officer for employees in the Central Office is the Deputy Assistant Secretary—Indian Affairs (Operations).

(e) No employee of the Bureau of Indian Affairs may have any interest in any purchase or sale involving

property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau if such employee is employed in the office or installation of the Bureau which recommends, approves, executes, or administers such transaction, grant, or contract on behalf of the United States, except that, as authorized by section 437(b)(1) of title 18 U.S. Code an employee of the Bureau may have such an interest if such purchase or sale is approved by an authorized officer of the Bureau, as designated in paragraphs (e) (3) to (5) of this section, and the conditions in (e) (1) and (2) of this section are satisfied to the extent to which they are applicable to the transaction concerned:

(1) The conveyance or granting of any interest in property held in trust or subject to restriction against alienation imposed by the United States is otherwise authorized by law.

(2) Trading by employees with Indians which involves property or funds which are either held in trust by the United States or are subject to restrictions against alienation imposed by the United States must be conducted on the basis of sealed bid or public auction. If the trading involves leases or sales of trust or restricted Indian land it must be conducted on the basis of sealed bids. Such requirements for sealed bid or public auction may only be waived by the Assistant Secretary for Indian Affairs on the basis of a full report showing:

(i) The need for the transaction,

(ii) The benefits accruing to both parties,

(iii) That the consideration for the proposed transaction shall be not less than the fair market value of the trust or restricted property or interest therein, unless the employee is involved in a transaction in accordance with § 152.25 (c) or (d) or § 162.5(b) (1), (2), or (3) of this title or the employee is the recipient of a benefit for tribal members for which a uniform charge to all members is made, and

(iv) An affidavit as follows shall accompany each proposed transaction: "I (name) (title), swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my employment in the Bureau in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction."

(3) The authorized officer of the Bureau for employees employed on reservations, in agencies or service units is one who is not a relative by blood or marriage of the employee, and is not employed at the employee's reservation, agency or service unit. That officer must also be employed at not less than one grade level higher than such employee at the Washington, District of Columbia, Central Office or at an Area Office other than that with authority over the employee's reservation, agency, or service unit.

(4) The authorized officer of the Bureau for employees employed in Area offices is one who is not a relative by blood or marriage of the employee, is not employed at the employee's area office, and must be employed at not less than one grade level higher than the employee at the Washington, District of Columbia, Central Office.

(5) The authorized officer of the Bureau for employees employed at the Washington, District of Columbia, Central Office is the Secretary.

(f) Except as provided in subsection (b)(2) of section 437 of title 18 U.S. Code as implemented by this section, nothing in the cited law shall be construed as preventing any employee of the Bureau who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such employee who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or cooperative association organized by Indians, when authorized under such rules and regulations as the Secretary or his/her designee has prescribed or shall prescribe.

§ 140.9 Application for license.

(a) Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the Superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 2-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the Superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

(b) Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent setting forth the class of trade or peddling to be carried on, furnishing such character or credit references, or both, as may be required by the Superintendent. The period of the license for such itinerant peddlers shall be determined by the Superintendent.

(c) When a license or permit to trade is issued under the regulations in this part 140, a fee of $5, payable when the license is issued, shall be levied against the licensee.

§ 140.11 License period.

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period

shall correspond to the period of the lease or permit held by the licensee on restricted Indian land, except that where the proposed licensee is the owner or beneficial owner or holds a use right to the land on which the business is to be conducted, the license period shall be fixed by the Commissioner of Indian Affairs or his authorized representative, but in no case shall the license period exceed 25 years.

§ 140.12 License renewal.

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 140.13 Power to close unlicensed stores.

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 140.14 Trade limited to specified premises.

No trade with Indians is permitted at any other place than that specified in the license. Licenses to [*sic*] not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 140.15 License applicable for trading only by original licensee.

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 140.16 Trade in annuities or gratuities prohibited.

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 140.17 Tobacco sales to minors.

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 140.18 Intoxicating liquors.

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use of [*sic*] permit to be used any part of his premises for the manufacture, sale, gift, transportation,

drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 140.19 Drugs.

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 140.21 Gambling.

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 140.22 Inspection of traders' prices.

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 140.23 Credit at trader's risk.

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the

collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 140.24 Cash payments only to Indians.

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 140.25 Trade in antiquities prohibited.

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 140.26 Infectious plants.

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed, or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

Supreme Court, U.S.
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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE EMPIRE STATE PETROLEUM ASSOCIATION, INC. AND THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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No. 93-377

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief of the Empire State Petroleum Association, Inc. and the Petroleum Marketers Association of America, Inc. as *amici curiae* in support of the Petitioners

Preliminary Statement

This brief is filed on behalf of the Empire State Petroleum Association, Inc. (ESPA) and the Petroleum Marketers Association of America, Inc. (PMAA) as *amici curiae* in support of Petitioners on the review of this matter following this Court's granting of a Writ of Certiorari to the Court of Appeals of the State of New York by Order dated November 1, 1993. The consents of all parties to the filing of this brief were obtained and have been filed with the Clerk of the Court.

Interest of the *Amici Curiae*

The Empire State Petroleum Association, Inc. is a New York not-for-profit trade association representing approximately 450 individual-member companies engaged in supplying and marketing refined petroleum products and related services to consumers throughout the State of New York.[1] ESPA's membership is predominantly comprised of independent wholesale and retail distributors of gasoline, diesel fuel, heating oil, and other petroleum based products. ESPA members who are engaged in motor fuel distribution or who own or operate retail service stations, particularly in the Central and Western regions of New York State, compete with Indian retailers for the sale of motor fuels to non-Indians. ESPA dealers and service station operators collect and remit to the State Department of Taxation and Finance

[1]Neither ESPA nor PMAA has any parent or subsidiaries to list pursuant to Rule 29.1.

motor fuel taxes on the sale of products to consumers. In contrast, Indian retailers refuse to pay these taxes on sales of motor fuel products to non-Indians although such taxes are lawful and are required to be collected. Consequently, Indian retailers enjoy a tremendous price advantage on the sale of their products, a price advantage with which petroleum marketers cannot compete.

PMAA is a not-for-profit federation of forty-four state and regional trade organizations (including ESPA) representing more than ten thousand independent petroleum marketers throughout the United States. Collectively, these marketers distribute approximately half of the gasoline and sixty percent of the diesel fuel consumed annually in the United States.

PMAA notes that the unfortunate tax avoidance trend which has sharply impacted petroleum marketers in New York, is starting to spread to other parts of the country. Marketers in many parts of the country have complained of having to compete with tax free sales of motor fuel to non-Indians on Indian reservations. Consequently, this Court's decision on the effort by the State of New York to ensure equitable collection of state taxes, will certainly have relevance well beyond the boundaries of New York State, thereby affecting PMAA's members.

ESPA's and PMAA's purpose in filing this brief is to bring to the Court's attention matters of significant public importance which will not be presented by the parties. Specifically, the outcome of this case will not only determine the validity of the state's cigarette tax regulations, but

will also impact upon similar motor fuel tax regulations, and ultimately the competitive viability of the associations' members. In addition, the *amici* believe that the case has widespread implications concerning the state's ability to balance delicately the sovereign rights of an Indian nation with its own lawful right to collect taxes on sales to non-Indians, and the effect of such efforts by the state upon competing businesses, the public and the local economies.

The cigarette tax scheme under scrutiny in this case (20 NYCRR Parts 335.6 and 335.7)[2] was designed to alleviate tax evasion which occurs on the sale of cigarettes on Indian reservations to non-Indians. The regulations are nearly identical to motor fuel tax regulations of the Department (20 NYCRR Parts 414.6 and 414.7) which were likewise created to prevent the tax-free sales of motor fuel. The tax schemes were simultaneously prepared, published for public comment and promulgated. Both sets of regulations became effective in November of 1988.

The similarity between the two schemes has been recognized by the New York courts. In *Matter of New York State Department of Taxation and Finance v. MacLeod*, 168 A.D.2d 802 (3d Dept. 1990) the Appellate Division held that New York's motor fuel tax scheme was invalid based upon its own previously issued opinion in this case involving the very cigarette tax regulations at issue here. See, *Milhelm Attea and Brothers v. Taxation and Finance*, 164 A.D.2d 300 (3d Dept. 1990). Consequently, this Court's decision on the validity of the cigarette tax scheme will

[2]In December of 1990, these regulations were renumbered without any substantive change. Former numbering is used here to avoid confusion in reviewing the state court opinions.

directly affect the related motor fuel regulations and ultimately the economic viability of motor fuel marketers.

The failure of Indian retailers to collect state taxes on sales to non-Indians not only deprives New York of tax revenue to which it is lawfully entitled, but oppresses competition and harms legitimate operators who collect state and local taxes on motor fuels and cigarettes. A gallon of gasoline costing $1.25 can be sold without state taxes for 32 cents less. A carton of cigarettes without state taxes is over five dollars cheaper. With these illegal price "discounts", competing businesses continue to lose non-Indian patronage to Indian retailers who openly market the sale of their tax-free products. The loss in motor fuel tax revenue has been estimated by the State to be $35 million annually (see, Petition for Writ of Certiorari dated August 31, 1993, p. 12, footnote 5). This is only a fraction of the loss in motor fuel sales that would otherwise be made by non-Indian businesses who collect taxes.

The motor fuel and cigarette tax schemes were crafted by the department to provide for the fair and equitable application and collection of state taxes on sales to non-Indians. In doing so, the regulations do not curtail the sale of tax-free products to Indians on reservations and only place minimal recordkeeping requirements upon Indian traders. If upheld, the state can prevent pervasive tax evasion while simultaneously restoring a fair, open and competitive environment to the retail motor fuel market.

The parties to this matter are properly concerned with establishing their legal points as to the validity of the Court of Appeals' June 10, 1993 Opinion. ESPA and PMAA, however, respectfully request that the Court also give con-

sideration to the broader public policy aspects of this case. This brief is submitted with the intention that it will assist the Court by bringing these matters to its attention.

Statement of the Case

ESPA and PMAA respectfully incorporate by reference the Statement of the Case as set forth in the Petitioners' brief.

Summary of Argument

The New York Court of Appeals Order should be reversed for two reasons. First, the Court of Appeals' June 10, 1993 opinion conflicts with this Court's prior opinions in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980), and most recently, *Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). These decisions recognized the right of states to impose minimal burdens on Indian traders to prevent tax avoidance by non-Indian purchasers of products from Indian retailers. It was the *Potowatomi* case which this Court ordered the Appellate Division to consider on remand of this matter (A17-A18). In addition, ESPA and PMAA believe that matters of significant public importance, which go beyond the state's lawful right to collect taxes on sales of products to non-Indians, warrant a reversal of the Court of Appeals' order (A1-A2). Specifically, whether and by what method the state can lawfully prevent tax avoidance by non-Indians will significantly impact the economic viability of competing businesses, and possibly that of surrounding communities as well.

ARGUMENT

I.

Significant Public Policy Implications Warrant a Reversal of the Order of the Court of Appeals

As noted above, ESPA and PMAA are concerned with the validity of motor fuel tax regulations (20 NYCRR 414.6 and 414.7) which are similar to the contested cigarette tax regulations under review here. This Court's decision will naturally determine the legal status of the motor fuel regulations promulgated by the state to prevent motor fuel tax evasion by non-Indians.

Without question, the state is entitled to payment of taxes on sales of taxable products sold by Indians to non-Indians and may even regulate Indian retailers on reservations to collect such taxes. *Potowatomi,* 498 U.S. 505, 512. It is the method of securing the collection and payment of those taxes that has proven difficult.

Attempts to enlist the aid of Indian retailers or Indian nations have not been successful, and prior regulations have been struck down by the New York Court of Appeals (*Herzog Brothers Trucking, Inc. v. State Tax Commission,* 69 N.Y.2d 536 [1987] and 72 N.Y.2d 720 [1988]). In response, the state carefully designed cigarette and motor fuel tax regulations that provide for the fair application and collection of state taxes solely on sales to non-Indians while only minimally burdening Indian traders. (20 NYCRR 414.6 and 414.7—motor fuel; 20 NYCRR 335.6 and 335.7—cigarettes). In New York, ESPA has long supported the develop-

ment and implementation of an equitable motor fuel tax scheme which ensures that members of industry and consumers pay their proportionate share of taxes and that no one is permitted to avoid taxes illegally. Nonetheless, without these regulations, the avoidance of tax will continue unabated to the detriment of the state, its businesses, and its citizens.

The avoidance of tax on the sales of cigarettes and motor fuels is a serious problem. The state reports annual tax revenue losses of approximately $65 million in cigarette taxes and approximately $35 million in motor fuel taxes because of reservation sales to non-Indians.[3]

The temptation for non-Indians to purchase motor fuel products from a reservation is considerable given the price discrepancy when taxes are not charged on the sale. A gallon of gasoline which costs a $1.25 includes approximately 50 cents in taxes, of which 32 cents are attributable to state taxes. A gallon of diesel which costs $1.35 includes approximately 60 cents in taxes, of which 35 cents are attributable to state taxes. A 32 or 35 cents-per-gallon price advantage is a margin against which petroleum marketers cannot compete.[4]

Since many state highways and roads traverse reservations, there are numerous easily accessible motor fuel distri-

[3]Even these figures may be underestimated. As the petition for Writ of Certiorari noted, the estimate is based only on those suppliers who responded with data. (See Petition, p. 12, fn. 5.)

[4]Petroleum marketers further suffer in damage to their reputation. Despite widespread publicity, ESPA reports that many consumers erroneously believe that the honest marketer is overcharging the customer in the sale of motor fuel products.

bution sites offering tax-free sales of cigarettes and motor fuels. Those members of ESPA who operate retail gasoline service stations within reasonable proximity of Indian reservations, and those members who distribute and supply motor fuel and other products to those service stations, are suffering economic losses from the tax-free sales made on motor fuel products sold on Indian reservations to non-Indians. According to ESPA, some of its members have been forced out of business, while others are in jeopardy of following the same course. Some have downsized due to considerable loss of business. Distributors and service station operators cannot compete with Indian retailers who do not collect and pay state taxes and who aggressively and openly market this fact to customers.

The harmful economic impact attendant to this tax avoidance problem is not limited to service station dealers. The loss or downsizing of retail service station dealers engenders further wide ranging detrimental economic impacts. The closing or downsizing of retail stations engenders the loss of a needed public service, decreases competition among service station operators and limits the choice of products, services, and retail establishments available to the consumer. The closing of service stations also results in significant revenue losses to the surrounding region, and an increase in unemployment of workers. Thus, the avoidance of tax has a direct and immediate adverse impact upon the surrounding counties, towns, villages and other political subdivisions of the state.

The adverse effects of these tax-free sales also impact businesses and communities throughout the state, not merely the areas near the reservations. Since tractor trailers typically can carry over 200 gallons of fuel, they can, for

example, fill up with tax-free motor fuel on a reservation in Western New York and have sufficient fuel to travel to Boston and return without refueling, bypassing all the stations and truck stops along the way. Understandably, those operators and adjacent communities would suffer economic losses.

ESPA and PMAA respectfully submit that this Court's decision will not only impact upon sales of motor fuels and cigarettes, but ultimately any other product which is or could be sold on reservations to non-Indians. Without doubt, other Indian nations and entrepreneurs in New York State[5] and throughout the nation, will monitor this Court's decision. An affirmance of the Court of Appeals' order nullifying the state tax regulations will essentially permit tax evasion to take place throughout the State of New York and encourage additional tax evasion nationwide with respect to many products and services, besides cigarettes and motor fuel, which are taxed by each state.

[5]Indian reservations are located throughout the state, including Northern New York and Long Island, as well as Central and Western New York.

II.

The Court of Appeals' Decision is in Conflict with the Decisions of This Court Permitting States to Impose Minimal Burdens on Indian Traders to Prevent the Avoidance of Taxes by Non-Indian Purchasers of Products From Indian Retailers

Relying mostly on its previous opinions in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536 (1987) and 72 N.Y.2d 720 (1988) and broad language from this Court's opinion in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the New York Court of Appeals found New York's cigarette tax regulations invalid under a rigidly applied preemption test because the Respondents are Indian traders (A7). In essence, the Court of Appeals' decision holds that Indian traders are endowed with automatic and absolute immunity from even the most minimal burdens created by state tax regulations designed to collect taxes from non-Indian purchasers. However, as this Court noted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989):

> "Questions of pre-emption in the [area of Indian affairs] are not resolved by reference to standards of preemption that have developed in other areas of the law, and are not controlled by 'mechanical absolute conceptions of state or tribal sovereignty.' [Citation omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. *Each case 'requires a particularized examination of the relevant state, federal and tribal interests'* " [Citation omitted] (Emphasis supplied).

It is respectfully submitted that in reviewing the challenged regulations, the Court of Appeals did not perform such an

examination balancing state, federal and tribal interests, but rather adhered to its prior *Herzog* determinations which are in direct conflict with this Court's decisions in *Moe*, *Colville* and *Potowatomi*.

Moreover, the Court of Appeals placed undue emphasis upon the language of *Warren Trading Post* which stated that Congress has preempted the field of Indian trading on reservations. In doing so, it failed to apply this Court's subsequent opinions in *Moe*, *Colville*, and *Potowatomi*, and instead, continued to invoke its rigid and erroneous view of the applicable legal standard.

In *Moe*, this Court validated a State of Montana tax scheme which required Indian tribal retailers to collect a state sales tax imposed upon non-Indian purchasers of cigarettes. Balancing the competing sovereign interests, this Court found:

> "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax . . . this burden is not, strictly speaking, a tax at all . . . [w]e see nothing in this burden which frustrates tribal self-government, [citations omitted] or runs afoul of any congressional enactment dealing with affairs of reservation Indians . . ."

Moe, 425 U.S. at 483.

Significantly, in *Moe*, this Court distinguished *Warren Trading Post* primarily on the ground that the Arizona tax was a gross income tax imposed upon the on-reservation sales by the Indian trader to the reservation Indians. This Court recog-

nized that the legal impact of the Arizona tax fell upon the Indian trader with the economic burden of such tax affecting both the Indian trader and the Indian tribe while in *Moe*, the economic impact of the Montana tax rested on the non-Indian. 425 U.S. at 482.

This Court confirmed the Montana tax scheme requiring pre-collection by both Indian traders and reservation Indian retailers of the cigarette tax imposed upon non-Indian purchasers. As the *Moe* opinion noted, "[w]ithout the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." 425 U.S. at 482. Thus, after weighing state, federal and tribal interests, the Court permitted the state to require the Indian proprietor to add state tax to sales made to non-Indians.

This balancing approach was subsequently applied in *Colville* where this Court approved the State of Washington's cigarette tax laws which imposed obligations upon the operators of tribal smokeshops to assist in the collection of tax on non-Indian purchases and prevent the avoidance of tax by non-Indians on such purchases. The Indian retailers, who were also licensed Indian traders, were required to purchase and affix tax stamps to cigarette packages intended for sale to non-Indians and to meet regulatory record-keeping requirements pertaining to such sales.[6]

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[6]The *Colville* opinion also confirmed this Court's prior decision in *Moe* stating that state excise and sales taxes on cigarettes could be collected on non-Indian purchases made on Indian reservations. 447 U.S. at 151. Indian retailers, therefore, could be required to collect such taxes on their sales to non-Indians.

Perhaps most significant was that in *Colville* this Court recognized and validated a state's power to seize shipments of unstamped cigarettes traveling to the reservation from out-of-state suppliers even though the tribal businesses were "concededly exempt from state taxation, [and] no state tax is due when the cigarettes are in transit." 447 U.S. at 161. This Court continued:

> "We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. [Citation omitted] By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests."

Colville, 447 U.S. at 161-162.

In *Colville*, this Court foresaw with prescient clarity the very problems now faced by non-Indian retailers in New York:

> "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservation by activities in which the Tribes have a significant interest. [citations omitted] What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions . . . If this assertion were accepted, the Tribes could . . . open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas."

Colville, 447 U.S. at 155.

This Court also reviewed the issue of federal preemption in a broader context and examined all the pertinent federal Indian statutes, including the Indian Trader Law (25 U.S.C. §261 *et seq.*). Based upon its review, this Court concluded:

> "The Indian Trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citing *Warren Trading Post*], but no similar intent is evident with respect to sales by Indians to nonmembers of the tribe."

Colville, 447 U.S. at 155-156.

The *Colville* opinion demonstrates that the conclusion of the Court of Appeals below (i.e., that the Indian Trader Laws automatically place every trader beyond state regulatory authority) is in error. This is further and explicitly illustrated by this Court's holding in *Potowatomi*.

In conformance with its prior decisions in *Colville* and *Moe*, this Court held in *Potowatomi* that the Indian tribe's sovereign immunity did not prevent the State of Oklahoma from taxing cigarette sales to non-Indians at the tribal store. Furthermore,

this Court reaffirmed the principle that the tribe has an obligation to assist in the collection of validly imposed state taxes on such sales. 498 U.S. at 512. While this Court explicitly recognized that Indian sovereign immunity could bar the State of Oklahoma from pursuing a lawsuit directly against the tribe for the tax imposed, it noted that there existed adequate alternate remedies to the state. Among the remedies specifically enumerated was the collection of the state tax from cigarette wholesalers:

> "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, (Colville, supra,* 447 U.S. at 161-162), *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v. Oklahoma Tax Commission,* 898 F.2d 122 (CA10 1990)" (Emphasis added).

Potowatomi, 498 U.S. at 514.

This Court obviously recognized that vendors engaged in trade with Indian tribes on reservations are not automatically absolved or immune from complying with duly promulgated state tax regulations intended to ensure tax payment for sales made to non-Indians. In addition, the state is empowered to use such traders to assure that the proper taxes are, in fact, collected and remitted. The imposi-

tion of such a duty upon vendors trading with Indians is a minimal burden permissible under the balancing of federal, state, and Indian interests.

The Court of Appeals opinion improperly attempted to distinguish *Potowatomi* on a ground neither considered nor mentioned in any of this Court's opinions. Specifically, the Court of Appeals stated that the remedies listed in *Potowatomi* "might somehow be used to retroactively collect taxes unpaid on past sales" (A11) but did not permit the state to exercise prospective regulatory authority over Indian traders. This distinction does not appear in this Court's *Potowatomi* decision, and neither is it logical. Whether a state possesses the right to place minimal burdens upon an Indian trader will not be altered or influenced by the fact that such burden is prospective or retroactive.

The Court of Appeals further ruled that even if minimal burdens were permissible, the instant tax regulations impose "significant" burdens which require their invalidation (A11-A12). This point is clearly in error. In *Colville*, this Court approved recordkeeping requirements which were more pervasive and expansive than the burdens imposed under the New York regulations.

Absent a reversal of the Court of Appeals order, the avoidance of tax in contravention of principles of sound public policy and federal law will continue and likely expand, both in New York State and nationwide. This should not be permitted since, as this Court has stated:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Colville, 447 U.S. at 155.

Conclusion

For the reasons stated above, the Court of Appeals Order of June 10, 1993 should be reversed and the validity of the state's tax regulations be upheld.

Dated: Albany, New York
December 14, 1993

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC. IN SUPPORT OF PETITIONERS

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The New York State Association of Tobacco and Candy Distributors, Inc. ("Association" or "*Amicus*") submits this brief as *Amicus Curiae* in support of the petitioners, the Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York.

INTEREST OF *AMICUS CURIAE*

Amicus is a New York not-for-profit corporation representing approximately 65 distributors of cigarettes in New York State. A list of the Association's members is set forth in the Appendix to this brief.[1] Its members sell to chain stores, other wholesalers, and retailers and distribute approximately 80% of all cigarettes sold in New York State.

The members of the Association generally sell only cigarettes, candy and related products. The Association's members purchase cigarettes directly from cigarette manufacturers and affix the required New York State and City excise tax stamps, purchasing the tax stamps at face value and recovering their cost when the cigarettes are sold, and are licensed agents of the State and City of New York for the collection of taxes on the sale of cigarettes within the State.

These cases represent an attempt to enjoin the enforcement of regulations, adopted by the Commissioner of Taxation and Finance in August, 1988, that were designed to prevent the sale of untaxed cigarettes to non-Indians at retail outlets on Indian reservations in New York State. In essence, the regulations permit retail dealers of cigarettes on qualified Indian reservations to purchase sufficient quantities of untaxed cigarettes to satisfy the needs of their Indian customers, while at the same time they attempt to ensure that if reservation retailers wish to make sales of cigarettes to non-Indians, they have a sufficient supply of taxed and stamped packages of cigarettes for that purpose. The regulations limit the sale of unstamped cigarettes to retailers at reservation outlets that have registered with the Department of Taxation and Finance. In addition, they limit the quantities of unstamped cigarettes that a reservation retailer may purchase or sell to an amount which is no greater than the maximum

[1] Two of the Association's members, Day Wholesale, Inc. and Milhelm Attea & Bros., Inc., the respondent in one of the cases, do not join in the brief *Amicus Curiae* of the Association.

legitimate Indian consumption of the reservation on which the retailer is located. 20 N.Y. Comp. Codes R. & Regs. §§ 336.6 (f) and (g) and 336.7 (b), (c) and (d) (1992).

The Association has a direct and vital interest in the continued viability and enforcement of these regulations and, therefore, in the outcome of these cases. Many of the Association's members compete directly with licensed cigarette agents and other wholesalers that do not collect cigarette taxes on cigarettes sold to retail outlets on Indian reservations in New York State for resale to non-Indian purchasers. The tax on cigarettes in New York State is currently 56 cents on every package of 20 cigarettes sold. N.Y. Tax Law § 471(1) (McKinney Supp. 1993), *as amended by* 1993 N.Y. Laws ch. 57, § 53 (McKinney) (effective June 1, 1993). Agents and other wholesalers that do not purchase and affix the required tax stamps on packages of cigarettes sold to retailers at reservation outlets for resale to non-Indians evade the collection of $5.60 in cigarette taxes on every carton of cigarettes sold to Indian retailers for resale to non-Indian purchasers in New York State and thereby enjoy an unlawful competitive advantage over competing Association members and other legitimate agents that pay and collect the required tax on all of their cigarette sales within the State.

Indian retailers, in turn, aggressively market their exemption from State taxation to non-Indians who do not enjoy such an exemption, thereby achieving an unfair and inequitable price advantage over non-reservation businesses. As a result of an increase in State taxes on cigarettes of nearly 167% over the past five years, cigarette taxes have become an increasingly large percentage of the average wholesale price of a carton of cigarettes sold in New York, resulting in an increasingly unfair competitive burden on legitimate agents and other wholesalers. At the current average wholesale price of approximately $16.00 a carton, the cigarette tax imposed represents 35% of the average wholesale price of cigarettes sold within the State.

At the same time, violations of the State's regulations with respect to the possession, transportation and sale of cigarettes

by reservation retailers within the State and by their off-reservation suppliers, have grown at an ever-increasing rate. Consequently, the State's ability to monitor the movement and distribution of cigarettes throughout the State has been severely hampered and the corresponding opportunity for evasion by reservation retailers and their suppliers of the sales and cigarette taxes imposed on non-Indian consumers within the State has become increasingly difficult to detect and prevent. The evasion of State taxes on reservation sales of cigarettes to non-Indian purchasers upon whom the State has the indisputable right to impose taxes assumes two distinct forms. The first involves supplying untaxed cigarettes to reservation outlets for direct sale to purchasers who either consume or resell the product within the State without paying the applicable taxes. The second entails using locations on Indian reservations as delivery and storage points for large volumes of untaxed Canadian and American brands of cigarettes, a portion of which is believed to be ultimately smuggled back into Canada, with the remaining portion being diverted to distribution and consumption in New York State.

Based upon a study undertaken in early 1993 by the Office of Tax Policy and Analysis of the Department of Taxation and Finance, the State estimates that the sale of unstamped cigarettes to non-Indians by retailers at reservation outlets has resulted in the loss to the State of an estimated $50 million in excise tax on cigarettes and $15 million in sales and use taxes annually. These figures include only a portion of the losses attributable to bootlegging and unlawful exports of cigarettes from Canada through Indian reservations into New York. They also do not take into account sales by out-of-state suppliers not licensed by the Department, nor do they reflect the recent increase in the tax on cigarettes in New York State from $3.90 to $5.60 a carton. The Association believes that the actual loss in taxes annually to the State because of reservation sales of cigarettes to non-Indians is substantially higher. The industry estimate for lost State and local taxes on cigarettes sold on Indian reservations is more than twice this amount. *See* Testimony of Robert W. Reid, Executive Director, Independent Petroleum Marketers

of New York, at the Joint Legislative Hearing before the New York State Senate Standing Committee on Corporations, Authorities and Commissions and the New York State Assembly Subcommittee on Corporate Law, at 2 (May 27, 1992) (estimating lost State and local taxes on gasoline, diesel fuel and cigarettes sold on Indian reservations of in excess of $200 million).

According to the State's figures for the fiscal year ended March 31, 1993, the State collected approximately $543.9 million in excise tax on cigarettes alone. Thus, the $50 million in uncollected cigarette excise tax on the sale of unstamped cigarettes by reservation retailers represents approximately 9% of the taxable market.

In calendar year 1991, cigarette tax agents reported 10.6 million cartons of cigarettes sold on Indian reservations. During the fiscal year ended March 31, 1993, the Department of Taxation and Finance estimates that this figure increased to approximately 12.8 million cartons of cigarettes sold by licensed agents and wholesalers on Indian reservations – almost *100 times* the amount estimated to have been consumed (on average) by every enrolled Indian man, woman and child during that period. If all 12.8 million cartons estimated to have been sold on reservations during this period were consumed by enrolled Indians on reservations, every man, woman and child would have had to have consumed on average 12,800 packs of cigarettes (approximately *35 packs per day*) – as compared to the New York average of 130 packs of cigarettes a year – an amount almost 100 times the New York average. These figures represent estimates of only those cigarettes that *licensed* agents and wholesalers sold on Indian reservations over the past year. The actual amounts of unstamped cigarettes entering Indian reservations are undoubtedly far greater because unlicensed wholesalers do not file monthly reports or returns with the Department and the estimated figures do not fully take into account illegal bootlegging.

The unfair and inequitable competitive disadvantage to the Association's members that compete directly with licensed agents

and other wholesalers who do not collect cigarette taxes on cigarettes sold to retail outlets and Indian reservations for resale to non-Indian purchasers has forced numerous legitimate agents and wholesalers to merge with other companies or go out of business altogether, with a resulting loss of business and jobs throughout large areas of the State. Based upon the State's conservative estimate of a $65 million loss to the State in cigarette, sales and use taxes annually – a loss that the Association believes to be significantly greater – the annual loss in revenue to Association members and other legitimate agents from the sale of untaxed cigarettes to non-Indians by retailers on Indian reservations is in excess of $205 million. Unless these regulations are upheld and enforced, legitimate wholesalers will continue to face unfair competition by agents and other wholesalers who evade their tax obligations.

ARGUMENT

Summary

The decision of the New York Court of Appeals is in direct conflict with the decisions of this Court in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and this Court's order in this case (112 S. Ct. 926), granting petitioners' initial petition for a writ of certiorari, vacating the Appellate Division's prior order and remanding the case to the Appellate Division for further consideration in light of *Potawatomi*. *Amicus* respectfully submits that, consistent with the prior decisions of this Court, the State of New York, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes, may require tax agents and other wholesalers that sell cigarettes to retail outlets on Indian reservations to comply with regulations which limit the quantity of untaxed cigarettes that can be purchased for resale by reservation retailers to an amount no greater than the maximum legitimate Indian consumption of the reservation on which the retailer is located and which impose upon the non-Indian suppliers only minimal burdens relating to recordkeeping and reporting.

THE REGULATIONS AT ISSUE AS APPLIED TO INDIAN TRADERS ARE VALID AND SHOULD BE UPHELD

This Court has been asked to determine whether New York State may enforce a regulatory scheme designed to aid in the collection of validly imposed State taxes on the sale of cigarettes on Indian reservations to non-Indian purchasers. The Court has made plain in its decisions in *Moe*, *Colville* and *Potawatomi* that States may impose minimal burdens on Indian trade to prevent the avoidance of tax by non-Indian purchasers of goods from retail outlets on Indian reservations. However, the court below decided that the regulations at issue could not be validly applied to the respondents' businesses, relying on its own decision in *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536, 516 N.Y.S.2d 179 (1987), *vacated and remanded*, 487 U.S. 1212, *aff'd on remand*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988), where the court held that the presumptive effect of the Indian trader statutes, 25 U.S.C. § 261 *et seq.* (1988), precluded the State from imposing *any* burden on Indian traders, however minimal.

Amicus believes that these cases were wrongly decided, that the decision below directly contravenes the prior decisions of this Court. If upheld, the consequence of the decision below will be that legitimate wholesalers will continue to face unfair competition by other wholesalers who evade their tax obligation and be subjected to significant losses in revenue from the sale of untaxed cigarettes to non-Indians on Indian reservations in New York State.

A. Under Federal Law, States May Require Wholesalers Who Sell to Reservation Outlets to Comply with State Tax Regulations Whose Purpose Is to Prevent the Avoidance of Tax by Non-Indian Purchasers of Goods

The Court of Appeals held that the regulations at issue were invalid per se simply because Indian traders were regulated, no matter how minimal the burden imposed. However, as this Court

plainly decided in *Moe*, *Colville* and *Potawatomi*, States may enforce regulations aimed at the collection of valid taxes on sales by Indians on Indian reservations that impose minimal burdens on Indian businesses, in order to prevent the avoidance of taxes by non-Indian purchasers of goods. If this holding is permitted to stand, New York will be left with no effective means to enforce the collection of its valid taxes on sales to non-Indians on Indian reservations and legitimate agents and wholesalers will be unable to compete with other wholesalers who evade their tax obligations.

In *Moe*, this Court explicitly ruled that states may regulate Indian retailers in order to ensure their compliance with valid state taxes. The Court found that Montana could require tribal sellers of cigarettes to collect a valid state sales tax imposed upon non-Indian purchasers of cigarettes. It held that a scheme whose purpose was identical to that of New York – the collection of valid state taxes – imposed a constitutionally permissible minimal burden on Indian businesses.

State regulations that require Indian retailers and their suppliers to assist in the collection of valid state taxes do not violate the letter of the Indian trader statutes so long as the regulations are not unreasonably burdensome, and do not violate the purpose of those statutes which were enacted to protect Indians from unfair advantage. *See, e.g., Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

As this Court found in *Moe*:

> [T]he competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.

425 U.S. at 482 (emphasis omitted).

425 U.S. at 482. In New York, the loss of tax revenue from sales to non-Indians on Indian reservations is the "largest single form of evasion . . . ." *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2 (quoting Commissioner James W. Wetzler).

In *Colville*, this Court cited *Moe* for the principle that "if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." 447 U.S. at 159. Significantly, the Court referred to Indian "businesses" and did not draw arbitrary distinctions based upon a business's place in the chain of distribution, as did the court below.

At issue in *Colville* was a Washington State tax on the sale of cigarettes within the State. As with the New York regulations at issue here, reservation Indians could purchase unstamped cigarettes sold by tribal members, but non-Indians were required to pay the tax. The *Colville* Court reaffirmed *Moe* in holding that a state could impose minimal burdens upon tribal smoke shop operators in order to eliminate the evasion of taxes by non-Indian cigarette purchasers at those shops, despite the fact that the smoke shop operators were federally licensed Indian traders who came fully within the scope of the Indian trader laws.[2] *See Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978), *aff'd in part and rev'd in part*, 447 U.S. 134 (1980).

The decision of the court below directly conflicts with *Colville*, where this Court extended the holding in *Moe* by holding that a state may enforce its regulations by seizing shipments of unstamped cigarettes sent to the reservation from wholesalers outside the state even though their sales to the Indian retailers were exempt from state taxation and no state tax was due while the cigarettes were in transit. 447 U.S. at 161-62. Although the goods at issue in *Colville* were seized from out-of-state

[2] This Court has interpreted the term "Indian trader" to apply to any person introducing goods or trading on an Indian reservation. *Central Machinery*, 448 U.S. at 164-65.

wholesalers off the reservation, the wholesalers clearly were "Indian traders" within the Indian trading laws. Unquestionably, the burden imposed on those wholesalers was no less significant than that rejected by the New York Court of Appeals in this case.

Respondents urge that, unlike cases solely involving the doctrine of tribal sovereignty, where minimal burdens on Indian commerce are permitted, the instant case turns on federal preemption and the bar to state regulation is therefore absolute. This argument, however, ignores the fact that the Court in *Colville* unequivocally held that federal Indian law did not preempt the right of a state to impose minimal regulatory burdens on reservation retailers to prevent the avoidance of tax by non-Indian purchasers, stating:

> We do not believe that principles of federal Indian law, whether stated in terms of *pre-emption, tribal self-government, or otherwise*, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

447 U.S. at 155 (emphasis added).

In *Potawatomi*, this Court further solidified the principle that such regulations are permissible. In that case, the Potawatomi tribe sued to enjoin an assessment by the Oklahoma Tax Commission seeking back taxes for cigarette sales over a four-year period at a convenience store owned and operated by the tribe on land held in trust for it by the Federal Government. While the Court found that the tribe's sovereign immunity prevented the collection of back taxes from a reservation retailer, as it did in *Moe* and *Colville*, it nonetheless concluded that sovereign immunity did not shield the tribe from prospective tax collection burdens. The Court held: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." 498 U.S. at 512. Significantly, this Court explicitly included Indian wholesalers among those to whom the State could look to collect taxes due:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or *by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.*

498 U.S. at 514 (emphasis added, citations omitted).

However, in the decision below, the New York Court of Appeals erroneously concluded that this Court's statement in *Potawatomi* meant that the "remedies" referred to may be employed only *retroactively* to collect unpaid taxes on past sales, and that the State could not require Indian traders to assist in tax collection prospectively. 81 N.Y.2d 417, 426; 599 N.Y.S.2d 510, 514. In light of the principal holding of the Court of Appeals, there is no meaningful basis for the distinction made in the decision below. If, as the Court of Appeals concludes, the Indian trader laws preclude the states from any regulation of trade with Indian traders whatsoever, any form of regulation would be prohibited, regardless of its retroactive or prospective nature.

Thus, it is clear that the holding of the court below in these cases that the Indian trader laws, by their very existence, place every transaction between an Indian retailer and its supplier beyond the regulatory authority of the states, is in direct conflict with federal law as interpreted by this Court. The consequence of the holding is that the State cannot effectively collect its valid taxes, and competitors of reservation suppliers are

left with no remedy for the loss of business due to the unlawful sale of untaxed cigarettes to reservation outlets for resale to non-Indian consumers.

B. The Regulations at Issue Providing for the Collection of Taxes on Sales of Cigarettes to Non-Indians Impose Minimal Burdens on Non-Indian Suppliers Permissible Under Federal Law

The principal holding in the court below that, to the extent that this Court's decisions in *Moe*, *Colville* and *Potawatomi* "may be read as validating the imposition of minimal burdens on Indian retailers and traders," the regulations at issue are barred by federal preemption because, in the Court's view, they impose "significant" burdens on wholesalers (81 N.Y.2d at 427, 599 N.Y.S.2d at 514), is also plainly erroneous. This Court has never held that state laws which merely impose recordkeeping and reporting requirements on wholesalers selling goods to retail outlets on Indian reservations in order to assist a state in collecting valid taxes place an unacceptable burden on Indian commerce. To the contrary, in *Moe*, *Colville* and *Potawatomi*, this Court upheld the principle that regulations no less "burdensome" than the regulations at issue here may be enforced to assist in the collection of validly imposed taxes.

In its decision below, the New York Court of Appeals relied on its prior ruling in *Herzog Bros.*, 69 N.Y.2d at 544, 516 N.Y.S.2d at 184 (*Herzog I*), where the court correctly expressed the standard to be applied in evaluating such state regulations:

> [W]hen a State tax is imposed upon, or otherwise burdens, a transaction between a non-Indian customer and an Indian individual or tribe, and the legal incidence of the tax is determined to properly fall on the non-Indian party, the Supreme Court has nonetheless "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of

> sovereignty that have developed from historical traditions of tribal independence" to determine whether the method of collecting the State tax is constitutional (Cohen, Federal Indian Law, at 413, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45).

This Court in *White Mountain*, however, went on to state that the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." 448 U.S. at 145. The New York Court of Appeals has erroneously applied a rigidly mechanical approach to the concept of tribal sovereignty in holding, without significant discussion, that the burden placed upon the wholesaler under the regulations at issue is excessive.

In each of the cases cited by the Court of Appeals where courts have struck down impermissible burdens on Indian trade, there was a direct state imposition on Indian commerce in the form of taxes, licenses, or other similar requirements aimed at or directly affecting Indians themselves. For example, in *White Mountain*, Arizona sought to enforce its motor carrier license tax and use fuel tax on a logging company that operated solely on an Indian reservation. This Court held that the taxes could not be enforced on "operations that are conducted solely on Bureau [of Indian Affairs] and tribal roads within the reservation." 448 U.S. at 148. The taxes would have taken value away from the reservation since the costs would be passed on to the Indian tribe, which was the beneficiary of the logging contracts. The Court found that the taxes would frustrate the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.' *Id.* at 149 (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

In the cases primarily relied upon in the decision below, *Herzog I* and *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 72 N.Y.2d 720, 536 N.Y.S.2d 416 (1988) (*Herzog II*), the Court

of Appeals struck down New York regulations aimed at the collection of valid state taxes on motor fuel. In those cases, however, Indians actually *paid* taxes and were required to assume the burden of applying for refunds or credits. Thus, the regulatory scheme at issue in the *Herzog* cases arguably violated federal policy by taking value from Indians either for the short term, until the tax was credited, or permanently from those Indians who were unwilling or unable to apply for refunds or credits. In contrast, however, the plan at issue here *never* imposes a tax upon Indian sales to Indian purchasers. For the Court of Appeals to apply the same mechanical approach in rejecting both a plan that taxes sales to Indian consumers and a plan that does not, simply because both plans, to whatever degree, *affect* Indians, plainly goes against the intent of the prior decisions of this Court, impairs the State's ability to collect legitimate taxes, and deprives members of the Association of substantial revenues in the face of unlawful competition.

Moreover, in the decision below, the Court of Appeals misinterpreted the clear intent of this Court in remanding this case. Twice now, in the instant case and in *Herzog I*, this Court has vacated judgments and remanded decisions for reconsideration in light of regulations that allow the State to collect its valid taxes while not taxing sales by Indians to Indian purchasers. Despite these remands, the Court of Appeals has not altered its view that any burden, however minimal and for whatever valid purpose, is improper. As this Court stated in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989):

> questions of pre-emption in [the area of Indian affairs] are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by "mechanical or absolute conceptions of state or tribal sovereignty." . . . . Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case "requires a particularized examination of the relevant state, federal, and tribal interests."

(citations omitted).

The Court of Appeals clearly has misread the intent of this Court in remanding these cases and the decision below should therefore be reversed.

In opposition to the petition for certiorari in these cases, *amici* the Seneca Nation of Indians, the Mohawk Tribal Council, the Honor Indian Treaties Committee, the Iroquois Business Association, and the Seneca Coalition Against Taxes (collectively "Seneca Nation") sought to distinguish cases decided by this Court that uphold other states' regulations requiring Indian retailers and their suppliers to assist in the collection of valid state taxes, urging that the exemption from taxation in New York is the result of the uniqueness of its treaties with Indians. Relying on the language of treaties with the Seneca Nation, the prohibition of direct state taxation of Indian lands and the Indian trader laws, the Seneca Nation argues that the State has no authority whatsoever to tax or otherwise regulate the sale of cigarettes on Indian reservations to non-Indians. However, the construction of the treaties with the Seneca Nation and the question of any incidental burden imposed by the challenged regulations on the Indian nations or the reservation retailer are not the issue before the Court. Rather, the question before the Court is whether states may impose minimal recordkeeping and reporting requirements on off-reservation suppliers to assist in the collection of a validly imposed tax.

Moreover, the same arguments that the Seneca Nation makes in these cases were made and rejected only last month in *Snyder v. Wetzler*, No. 67506, 1993 WL 463277 (N.Y. App. Div., 3d Dept. Nov. 10, 1993). In *Snyder*, a member of the Seneca Nation who conducts a retail business on the Cattaraugus Reservation in New York that derives a substantial portion of its revenues from the sale of cigarettes and gasoline to non-Indian purchasers sought a declaration that the State was without power to impose or collect taxes on such sales. The Indian retailer and the Seneca Nation, which also appeared in *Snyder* as *amici curiae*, advanced virtually the identical arguments that the Seneca Nation has urged in this case. Relying on this Court's decisions in *Moe*, *Colville* and *Potawatomi*, the *Snyder* court rejected those

arguments, holding that the State is not preempted from requiring an Indian retailer "to collect and remit State sales and excise taxes on . . . purchases of cigarettes and motor fuel by his non-Indian customers." 1993 WL 463277, at *3.

This Court's position on the important issue of whether a state may require wholesalers that sell cigarettes to retail outlets on Indian reservations to aid in the collection of validly imposed taxes on the sale of cigarettes on Indian reservations to non-Indian purchasers should be established beyond possib. dispute. Respondents urged in the court below that this Court's observations in *Potawatomi* that states could ensure the collection of cigarette taxes "by assessing wholesalers who supplied unstamped cigarettes to the tribal stores," 498 U.S. at 514, is mere *obiter dictum* and therefore has no precedential value. Even if this Court's observation in *Potawatomi* is *dictum*, it is well-settled that *dicta* of this Court must be accorded significant weight by lower courts. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 496 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *In re Comac Co.*, 402 F. Supp. 43, 45 (E.D. Mich. 1975). However, it is imperative that this vital issue be resolved in an unambiguous holding, in order to enable states to stem the increasing loss of revenues through misinterpretation of federal law, and to enable legitimate suppliers of reservation retailers to compete on a lawful and equal basis.

Congress never intended for Indians or their off-reservation suppliers to benefit from the windfalls that arise from the protections afforded by the Indian trader laws. If those statutes are construed to confer inequitable competitive advantages upon the Indian traders to the detriment of competing distributors, including members of the Association, and to facilitate the avoidance of legitimately imposed tax obligations, member distributors located in close proximity to reservations will continue to suffer substantial economic losses and the State will continue to be deprived of much-needed tax revenues.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Dated: New York, New York
December 15, 1993

Respectfully submitted,

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APPENDIX

MEMBER LIST

NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC.

Amsterdam Tobacco Co.
Amy-Lynne Corp. d/b/a Bellerose Tobacco
Andy's Tobacco & Candy Wholesale
Auer & Co., Inc.

Bonanza Trading Associates
Boro Park Tobacco Company
Borough Hall-Oxford Tobacco Corp.
Brighton Tobacco & Candy Co.
Buffalo Tobacco Products

C.G. Marousis Company, Inc.
Center Candy Corp.

Day Wholesale, Inc.
Derigo Sales, Inc.
Donohue and Higgins Candy & Tobacco Company

E.P. Kirst & Sons, Inc.
Elmira Tobacco Company, Inc.
Empire Candy & Tobacco Co.

F & T Distributing Co, Inc.
Finkle Distributors, Inc.
Frank Colucci Inc.

Globe Wholesale Co.
Gray's Wholesale, Inc.
Gutlove and Shirvint, Inc.

H.P. Brewster Company d/b/a Button Bros., Inc.
Harold Levinson Associates
Harry J. Fourtunis, Inc.
Herkimer Wholesale Co., Inc.

I. Rothschild, Inc.
Irving Ness Co.

J.A. Calderon & Company, Inc.
J.J. Maloney Company, Inc.
Jack Gordon Tobacco Co., Inc.
Jacob Kern & Sons, Inc.
Jones-McIntosh Tobacco Co.

Keystone Candy & Tobacco Co.
Kingston Candy & Tobacco Co.
The Koger Company, Inc.

Lavin Candy Co., Inc.

Mandel Tobacco Company, Inc.
Milhelm Attea & Bros., Inc.
Miller Automatic, Inc.
Morris Brown, Inc.
Mountain Candy & Cigar Co., Inc.
d/b/a Mountain/Service Distributors
Mutual Candy Company
Mutual Wholesale Services Inc.

Newcastle Tobacco & Candy, Inc.
North Country Candy and Tobacco Inc.

Queens Tobacco and Candy Company, Inc.

Richmond Wholesale Co., Inc.
The Rowe Corporation

S & L East Distributors, Inc.
Sanders-Langsam Tobacco Co., Inc.
Sho-Sho Bros., Inc.
South Beach Novelties & Confectionery Co., Inc.
Stan-Lou Tobacco Inc.
Standard-Rosenbaum, Inc.
Sunrise Candy & Tobacco Co.

T & R Tobacco Sales Company
Tzetzo Bros., Inc.

United Candy & Tobacco Co., Inc.

W.E. Brown & Company, Inc.
Westchester Candy Supply

Supreme Court, U.S.
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No. 93-377

In The

Supreme Court Of The United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioner

against

MILHELM ATTEA & BROS., INC., *et al.*,
Respondent

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

Amicus Curiae Brief Of The State Of Connecticut In Support Of Petitioners New York Department Of Taxation And Finance, Commissioner Of Taxation And Finance, And Tax Appeals Tribunal Of The State Of New York.

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QUESTION PRESENTED

Whether, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes from Indian retailers, the State of New York may require the retailers' cigarette suppliers to comply with regulations limiting the quantity of tax exempt cigarettes which can be purchased for resale at reservation outlets to an amount no greater than the maximum legitimate Indian consumption of the reservation, and imposing upon the suppliers minimal burdens relating to record keeping and reporting.

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No. 93-377

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*
Petitioner

against

MILHELM ATTEA & BROS., INC., *et al.*
Respondent

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

Amicus Curiae Brief Of The State Of Connecticut In Support Of Petitioners New York Department Of Taxation And Finance, Commissioner Of Taxation And Finance, And Tax Appeals Tribunal Of The State Of New York.

INTEREST OF THE AMICUS CURIAE

Amicus State of Connecticut by Richard Blumenthal, its Attorney General, and pursuant to Supreme Court Rule 37.5, as a state having within its borders Indian tribes and reservation lands, has an interest in the outcome of the legal issues presented by Petitioners in seeking reversal of the decision of the State of New York's Court of Appeals in this proceeding. The State of Connecticut has by statute recognized the existence of five Indian tribes. The government of the United States has recognized only one of them. The remaining four have not been recognized by treaty, statute, or act of the executive branch through the Department of the Interior's Bureau of Indian Affairs.

The decision of this Court may directly affect only the understanding of the reach of the federal Indian trader statutes regarding state taxing authority over Indian tribes with whom the federal government has formal and explicit dealings. Because there are four tribes which are not federally recognized in Connecticut, Connecticut asks this Court to clarify that the federal Indian trader statutes and this Court's decision in this case, do not apply to tribes without federal recognition.

In addition, the regulatory issues arising from the legal controversy presented by the Petitioners directly affect the ability of states to ensure that tax exemptions

of whatever legal source that apply to federally recognized Indian tribes are not applied beyond their intended scope. Because of the importance of a state's ability to regulate meaningfully in areas which the federal government has not chosen to preempt, the State of Connecticut supports the general view of other amici states that the decision below must be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Introduction:

The relation of state jurisdiction to the plenary power of the Congress to legislate on behalf of those tribes of Indians with which it has entered into a trust relationship, and to the Indian tribes themselves and their lands, is a complex legal inquiry.

The Indian nations for the most part once resided somewhere beyond the farthest reaches of settlement at the time when Congress first enacted a series of trade and intercourse acts in furtherance of its constitutional prerogatives.[1/] The once clear lines demarcating notions of virtually absolute Indian sovereignty with respect to the jurisdiction of the several states have evolved over time and in response to specific circumstances. As Justice Frankfurter wrote in

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1/ U.S. Const. art. I, § 8, cl. 3, authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The first trade and intercourse act passed by the Congress was that of July 22, 1790. 1 Stat. 137.

the case *Organized Village of Kake v. Egan*,[2/] "[t]he relation between the Indians and the States has by no means remained constant since the days of John Marshall."

One of the changed circumstances, in the modern era, as newly-founded states surrounded the Indian country, has been the increased frequency of contacts between Indians and non-Indians, and the concomitant legitimacy of state interests in regulating the affairs of non-Indians in those contacts. And in respect to such regulation, the taxing power of the State has very often been the agency of control. Nearly a century ago, the ability of a territorial government to tax the personalty of non-Indians within Indian country was tested in this Court.[3/] The analysis of the issue at that time centered upon whether the assertion of state jurisdiction was so proximate and direct as to be in effect the equivalent of a levy upon either the lands or privileges of the Indians themselves. The modern cases turn upon principles of federal preemption especially

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2/ 369 U.S. 61, 71 (1962).

3/ *Thomas v. Gay*, 165 U.S. 264 (1898) (tax on personalty imposed by territorial government of Oklahoma upon cattle which were grazed by non-Indians on the Osage Indian reservation); *see also Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (tax liability of personalty of non-Indian missionaries on reservation lands).

adapted to federal Indian law,[4/] but continue to address the same core issue respecting the *extent* and not *whether* state jurisdiction may extend to matters involving the on-reservation activities of non-Indians.

Finally, it cannot be emphasized too strongly that the context in which federal preemptive principles operate in this area is solely in respect to those Indian tribes for which the federal government affirmatively has chosen to exercise its plenary constitutional authority. Federal recognition of Indian tribes and the government-to-government relationship arising therefrom is the backdrop against which the prior taxing cases of this Court have been decided.[5/] The instant case is important because it tests the allowable extent of the state taxing authority over certain activities of Indian traders and non-Indians. The question whether and to what extent that authority may reach tribal entities having a relationship with the state but not with the federal government is a collateral issue in this case, but one of signal importance to states like Connecticut,

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4/ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law.")

5/ Most of those cases involved state efforts to tax Indians on tribal reservations. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165 n.1 (1973); *see also Oklahoma Tax Commission v. Sac and Fox Nation*, ___ U.S. ___, 113 S.Ct. 1985 (1993).

which hosts both tribal categories, federally recognized and not, within its borders.

B. Summary of Argument:

1. Indian trader statutes are restricted to activities conducted by Indian traders with the permission of the federal government within Indian country upon reservations created by treaty or some other expression of the federal government such as statute or executive order. Accordingly, state cigarette sales regulation outside of Indian country or in relation to Indians otherwise unrecognized by the federal government is presumptively valid.

2. The general preemptive effect of the Indian trader statutes, 25 U.S.C. § 261 *et seq.*, is not controlling in the specific area of state cigarette tax regulation of on-reservation sales. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

3. Other precedent of this Court in the tax field confirms that a particularized examination of relevant state, tribal and federal interests must be undertaken prior to making any determination of the preemptive effect of the Indian Trader statutes upon state on-reservation cigarette sales tax regulation.

ARGUMENT

I. Neither The Existence Nor The Administration Of The Indian Trader Statutes Preempts State Jurisdiction Over Transactions Involving Indians And Non-Indians When Indian Country Or Federally Supervised Reservations Are Not Involved.

A. A legal distinction exists between Indian tribes recognized by the Federal Government and those not so recognized.

The instant case is presented in a fashion which presumes that the tax regulations of New York's Department of Taxation and Finance impinge upon federal prerogatives with respect to relations with all the Indian tribes in New York; hence, the focus in the case throughout has been upon federal preemption generally and the operation of the Indian trader statutes in particular. Indeed, the regulations at issue embrace all nine tribal groups extant in New York. *See* 20 N.Y.C.R.R. § 335.6(b)(2); Pet. App. at A63.[6/]

Two of these New York tribes are not federally recognized. That is, there exists no acknowledgment by

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6/ "(2) *Exempt Indian nation or tribe* for the purpose of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondage Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians."

the federal government of any special relationship between it and the tribes in question.[7/] Such a determination is, in the ordinary course, made by the executive branch of the government, and specifically by the Bureau of Indian Affairs within the Department of Interior. *See* 25 C.F.R. Part 83; *see also United States v. Sandoval*, 231 U.S. 28, 46-47 (1913); *La Pier*, 986 F.2d at 305; *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.), cert. denied, 111 S.Ct. 2235 (1991). This distinction is of no immediate consequence if this Court concludes that the New York regulations do *not* impinge upon an area where federal interests and legislation leave no room for assertions of any state jurisdiction. Clearly, if these regulations pose no significant regulatory burden upon Respondents as federally licensed Indian traders in their dealings with and on any federally recognized Indian reservation or lands, they pose no burden at all from the standpoint of preemption analysis in dealing with Indians or with reservations not subject to federal supervision. *Cf. LaPier*, 986 F.2d at 305-306, *quoting United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (member of tribe unrecognized by federal government is outside federal

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7/ The two tribes, the Poospatuck and Shinnecock, are not on the comprehensive list of Indian tribes prepared by the federal Bureau of Indian Affairs and published most recently in 1988 at 53 Fed. Reg. 52,829 (1988) and updated. 25 C.F.R. Part 83. *See LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993); *see generally United States v. John*, 437 U.S. 634 (1978).

criminal jurisdiction in Indian Country, 18 U.S.C. § 1153, just as member of "terminated tribe" no longer considered an "Indian" for the purposes of the exercise of federal criminal jurisdiction). But if this Court determines that the Court of Appeals is correct in its reading of the preemptive effect of the Indian trader statues, then the result should be limited to those geographical areas where Indian traders carry out their licensed activities, that is, in "Indian country." Either outcome needs clarification concerning the relevance of federal recognition to the present controversy.

Connecticut is sensitive to the reach of the term "Indian country" or references to "reservation Indians,"[8/]

8/ The Court in *McClanahan* stated that its use of the term "reservation Indians," *see Williams v. Lee*, 358 U.S. 217, 220, (1959), was in recognition of the fact that, although the Congress most often legislates on Indian matters dealing with Indian tribes as "collective entities," these entities were comprised of individuals, and that such legislation confers rights upon individuals. *McClanahan*, 411 U.S. 164 at 181. Thus, the term "reservation Indians" as employed in this and other decisions of this Court, *see e.g. Warren Trading Post v. Tax Commission*, 380 U.S. 685, 691-92 (1965), is firmly within the ambit of federal and not state Indian laws. In *Williams*, the term "reservation Indians" is discussed with reference to Chief Justice Marshall's opinion in *Worcester v. Georgia*, 6 Pet. 515 (1832), in which he described Indian nations as "distinct political communities, having territorial boundaries, ... which is not only acknowledged, but guarantied by the United States." *Worcester*, 6 Pet. 515 at 557. Therefore, Indians residing upon reservations not supervised by the United States are not "reservation Indians" as that term has been utilized in the decisions of this Court.

because only one of five indigenous Connecticut tribes has been recognized by the federal government. *See* 25 U.S.C. §§ 1751-1760 (Mashantucket Pequot Indian Land Claims Settlement) and § 1758 (extension of federal recognition); Conn. Gen. Stat. § 47-59a(b). The remaining four tribal groups are "state-recognized" only,[9/] and three of them have reservation lands identified by state statute. Conn. Gen. Stat. § 47-63.

In applying these principles, Connecticut must distinguish between the effect of its revenue laws[10/] upon tribal groups recognized and not recognized by the federal government. Only in the former case would preemption analysis be available, and not in the latter.

B. The Indian trader statutes apply exclusively to licensing by the Commissioner of Indian Affairs within "Indian country," or upon federal "Indian reservations."

The Indian trader statutes, 25 U.S.C. § 261 *et seq.*, assign to the federal Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes ...." 25 U.S.C. § 261. Permission from the commissioner is required of anyone "desiring

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9/ Section 47-66h(b) of Connecticut's General Statutes states that nothing in the state law chapter dealing with Indians "shall be construed to confer tribal status under federal law on the indigenous tribes named in section 47-59a ...."

10/ Connecticut revenue laws include the regulation of cigarette sales. *See* Conn. Gen. Stat. § 12-285 *et seq.*

to trade with the Indians on any Indian reservation ...." 25 U.S.C. § 262; *see Williams v. Lee*, 358 U.S. 217 at 218. The President of the United States is authorized to proscribe trade or the introduction of goods "into the country belonging to any Indian tribe ...." 25 U.S.C. § 263. Trading without a license by any non-Indian residing "in the Indian country, or on any Indian reservation as a trader ..." is subject to the assessment of a penalty. 25 U.S.C. § 264; *see Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160, 163 (1980); *White Mountain Apache*, 448 U.S. 136 at 152; *Warren Trading Post*, 380 U.S. 685 at 688-90. The close regulation of Indian trading is designed by the federal government to be protective of the Indians. 25 U.S.C. § 262; *Central Machinery*, 448 U.S. at 165; *Warren Trading Post*, 380 U.S. at 691. Protection was afforded by limiting the contacts of non-Indians with the tribes, something only possible when the federal government had undertaken supervision of the lands upon which the Indians were located.

The term "reservation" in the Indian trader statutes refers to Indian reservations belonging to federally recognized tribes enjoying the special status afforded them under federal law.[11/] In *Central*

11/ *See Morton v. Mancari*, 417 U.S. 535, 551 (1974), speaking of "the unique legal status of Indian tribes under federal laws and upon the plenary power of Congress, based on a history

(footnote cont'd)

Machinery, this Court began its discussion by noting that the Gila River Farms Indian Tribe "is federally recognized and is governed by a constitution adopted pursuant to the Indian Reorganization Act [and] ... conducts farming operations on tribal and individual trust land within the Gila River Reservation, which was established in Arizona by the Act of Feb. 28, 1859, ch. 66, 11 Stat. 333, 401." *Central Machinery*, 448 U.S. at 161.

Although historically an Indian "reservation" might not have been synonymous with the term Indian country as employed in the earliest pronouncements of the Congress, *United States v. Celestine*, 215 U.S. 278, 284-87 (1909), nevertheless, the present statutory definition of Indian country, 18 U.S.C. § 1151,[12/] is inclusive. *DeCoteau*, 42 U.S. 425 at 427; *see also United States v. McGowan*, 302 U.S. 535, 538-39 (1938); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. Sandoval*, 231 U.S. 28 at 37, 37n. and 46; *Donnelly v.*

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of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *See also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985).

12/ The statute defines the federal government's criminal jurisdiction over Indians. The decisional law has made the definition applicable to discussions of the reach of state civil jurisdiction over federally recognized Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

United States, 228 U.S. 243, 269 (1913).[13/] This Court has continued to construe that definition broadly. *Oklahoma Tax Commission*, 113 S.Ct. at 1991. Therefore, the terms "reservation" and "Indian country" are bound up with each other and with the Indian trader statutes in a context that is exclusively federal in character.[14/]

C. Preemption analysis in federal Indian law necessitates consideration of the geographical factor.

Federal Indian law is largely territorial in nature. Thus, the discussion of state, tribal and federal interests in the context of state assertions of authority has always considered the geographical nexus posed by the existence of terms like "Indian country," since these terms arise exclusively out of Congress' plenary power to regulate affairs with Indian tribes and the tribes' status as a "separate people with their own political institutions." *See Morton v. Mancari*, 417 U.S. 535; *United States v. Antelope*, 430 U.S. 641, 646 (1977). In

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13/ *Cf. United States v. Martin*, 14 F. 817, 822-23 (1883) ("Ever since the phrase "Indian Country" found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by the, and set apart or designated as exclusively for their use, under and by the authority of the United States.")

14/ *See e.g. United States v. Forty-eight Pounds of Rising Star Tea*, 38 F. 400, 401 (C.C.N.D. Cal. 1889), *construing* R.S. § 2133 (25 U.S.C. § 264).

White Mountain Apache, this Court has remarked that "there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache*, 448 U.S. 136 at 151 and at 143, *citing Moe*, 425 U.S. 463 at 475. This factor, as well as canons of construction unique to preemption analysis and favorable to the tribes, *see McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 at 174-75, relate solely to the assertion of jurisdiction by a state on the one hand, and federally recognized tribes and the federal government on the other. In cases where no similar conflict arises the geographical factor is not a bar to state jurisdiction. *See McGowan*, 302 U.S. 535 at 539.[15/]

Different considerations apply to tribal groups outside the recognition of the federal government and, hence, outside Indian country by definition, or outside the scope of the term "reservation Indians," in the usage of this Court. These entities are fully within state

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15/ "The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern." F. Cohen, *Handbook of Federal Indian Law*, 121 (1st ed. 1942).

jurisdiction, notwithstanding the fact that their members may be Indians in an anthropological or ethnohistorical sense. *LaPier*, 986 F.2d 303 at 306; *Heath*, 509 F.2d 16 at 19; *see also Sandoval*, 231 U.S. 28. Similarly, the activities of non-reservation Indians or those not dwelling in Indian country have been held by this Court to fall within state jurisdiction. *Organized Village of Kake v. Egan*, 369 U.S. 60 at 62.[16/] Also, the activities of reservation Indians outside of Indian country are largely within the jurisdiction of the states. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Kake*, 369 U.S. 60 at 75.[17/]

16/ *See Oklahoma Tax Commission*, 113 S.Ct. at 1992 (*McClanahan* presumption against state taxing authority applies to all Indian country, and not just formal reservations.") This Court in *McClanahan* described this situation - "the extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation" - as "something of a moot question," "since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction." *McClanahan*, 411 U.S. 164 at 172 n.8. The question may be moot when viewed from the federal perspective, but it is otherwise from the state perspective, when formalized dealings exist or are possible with tribal groups and their lands which are altogether outside the federal sphere.

17/ "State authority over Indians is yet more extensive over activities ... not on any reservation." *Kake*, 369 U.S. at 75. In *Mescalero Apache*, this Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to

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Accordingly, since any preemption challenge to New York's cigarette law regulations implicating the Indian trader statutes must be limited to Indian country, or, reservation Indians officially under the supervision of the federal government, the validity of those regulations vis-a-vis any non-recognized tribal groups or reservation lands remains unaffected and presumptively assured. The ability of such states as Connecticut, therefore, to control the commercial activities of non-Indians on the reservation lands of state acknowledged tribes is *a fortiori* not subject to preemption by the Indian trader statutes.

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non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 and cases cited. Importantly, the Court in *Mescalero Apache* stated that this principle was "as relevant to a State's tax laws as it is to its criminal laws ...." *Id.* at 149. In *Mescalero Apache* this Court upheld New Mexico's nondiscriminatory gross receipts tax as applied to an off-reservation ski resort operated by the Mescalero Apache Tribe. *See also United States v. Porter*, 22 F.2d 365 (1927) (personalty owned by an Indian and held outside the reservation subject to taxation by the state).

II. Even If Argument Is Restricted To The Application Of The Federal Indian Trader Statutes Within Their Proper Sphere, The Court Of Appeal's Decision Is Flawed By A Superficial Analysis Of The Preemptive Effect Of Those Statutes Upon State Regulation Of Cigarette Sales To Non-Indians On Indian Reservations.

The Court of Appeals conducted a preemption analysis of the validity of the New York cigarette tax regulations in relation to the existence of the federal Indian trader statutes, 25 U.S.C. § 261 *et seq.*, following this Court's remand of this case to New York's Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. [505, 111 S.Ct. 905, 112 L.Ed.2d 1112]." *Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance*, 81 N.Y.2d 417, 599 N.Y.S.2d 510, 615 N.E.2d 994, 996 (1993). The resulting decision misapplies *Potawatomi* and reads overbroadly the preemptive effect of the Indian trader statutes upon the particular object and means of regulation at issue.

The plaintiffs in the *Attea* case argued that New York's cigarette tax regulations[18/] as applied to them were invalid, because they impinged upon an area of the law relegated solely to regulation by the government of

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18/ The mechanics of New York's regulations were summarized by the Court of Appeals in Section I of its opinion. *Attea & Bros.*, 81 N.Y.2d 417, 615 N.E.2d 994 at 995-96.

the United States. For this proposition they raised the federal Indian trader statutes as a bar to state regulation of their cigarette sales on New York's Indian reservations. Significantly, the regulations at issue would not have affected sales by wholesalers of unstamped cigarettes to Indians for consumption by Indians on their reservations. They were designed to effect collection of the excise tax from wholesalers for cigarettes sold on the reservations to non-Indians. Nevertheless, the Court of Appeals agreed that the Indian trader statutes acted as an absolute bar to New York's attempt to prevent the circumvention of the tax by non-Indians who made cigarette purchases from retail outlets located on the reservations.

The Court of Appeals cited this Court's decision in *Warren Trading Post v. Tax Commission,* 380 U.S. 685, as support for its conclusion that the Indian trader statutes and regulations of the Commissioner of Indian Affairs duly promulgated thereunder, 25 C.F.R. § 140, were, in the words of the *Warren Trading Post* court, "all-inclusive" and provided "no room" for the imposition of additional burdens upon such traders by state laws. *Attea & Bros.*, 615 N.E.2d 994 at 996, *quoting Warren Trading Post,* 380 U.S. 685 at 690.

The State of Connecticut agrees with the Petitioners that the Court of Appeals has interpreted overbroadly the preemptive effect of the Indian trader statutes as articulated in *Warren Trading Post*. The position that the New York court has taken assumes

that Indian traders are entirely exempt from state revenue regulation. Not only is that position considerably undercut by the decisions in *Potawatomi, Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980), and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), for the reasons which the Petitioners have advanced, see Petition for Writ of Certiorari, No. 93-377, at 14-20, but it also does not heed the sound counsel of this Court that in the area of state revenue laws and federal Indian tribes "[g]eneralizations on this subject have become particularly treacherous." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 at 147. This Court has stated that preemption analysis in the context of legislation affecting federally recognized Indian tribes of its nature has to take into account the "respective rights of States, Indians, and the Federal Government." *Id.* at 148; *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 at 141-143 and cases cited therein.[19/]

19/ This means that the assertion of a state regulatory interest within reservation boundaries is not in and of itself flatly interdicted, *id.* at 141 and n.9, and is, further, subject to "no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Id.* at 142. On the contrary, such assertions are measured against theories of federal preemption or infringement of the rights of reservation Indians to self-rule. *Id., citing Warren Trading Post,* 380 U.S. 685 and *McClanahan,* 411 U.S. 164 (1973), and *Williams,* 358 U.S. 217 (1959).

When the state's regulatory interest involves the on-reservation conduct of Indians, this Court has held state revenue regulation to be preempted. *E.g. McClanahan,* 411 U.S. 164. But when the conduct of non-Indians has been at issue, the analysis has turned upon the competing interests noted above. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Ramah Navajo School Board of New Mexico, Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982); *White Mountain Apache*, 448 U.S. 136 at 145.[20/] Thus, while a state levy on gross proceeds of sale or gross income was held in *Warren Trading Post* to have infringed upon the federal government's comprehensive regulation of commerce with reservation Indians as applied to a licensed non-Indian trader doing business on a federal reservation, a state sales tax upon non-Indian on-reservation purchasers of cigarettes did not so infringe, even when the state regulatory scheme required an Indian retailer to collect the tax. *Moe,* 425 U.S. 463 at 482-83; *Washington v. Confederated Tribes of Colville,* 447 U.S. 134 at 150-62.[21/] In making its

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20/ This Court, in setting out the framework of analysis on this point in *White Mountain Apache*, specifically compared the results obtaining in *Warren Trading Post* with *Moe*. *White Mountain Apache*, 448 U.S. 136 at 145.

21/ The legitimate state interest in preventing the avoidance of the sales tax posed only a minimal burden upon the Indian traders in *Moe*, and *Warren Trading Post* was distinguished

(footnote cont'd)

preemption analysis, this Court in *Colville* took into account the potentially competing regulatory scheme of the Indian trader statutes and concluded that these sought "to regulate businesses *selling goods to reservation Indians* for cash or exchange ... but no similar intent is evident with respect to sales by Indians to *nonmembers of the Tribe.*" *Id.* at 155-56 (emphasis added). Thus, any distinction raised by the Court of Appeals between Indian trader wholesalers and Indian retailers collapses, especially in light of the fact, as Petitioners point out, that the Indian retailers in *Colville* were federally licensed Indian traders. *Confederated Tribes of Colville v. Washington,* 446 F.Supp. 1339, 1347 (E.D. Wash. 1978).

Apart from its analysis of the Indian trader statutes, on no other federal preemptive ground did this Court in *Colville* find the state tax interest inapplicable to the cigarette sales in question.[22/] Furthermore, this

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(footnote cont'd from previous page)

on this point. *Moe*, 447 U.S. 463 at 482-83. The State of Washington's *amicus* brief aptly discusses how regulations such as New York's represent a considered policy choice to avoid collection mechanisms which generate friction in state-tribal relations by focusing upon suppliers, who are further up the distribution chain from the Indian retailers, and on activities which are off the reservations.

22/ *Colville*, 447 U.S. 134 at 155-56 and 157. This Court determined that the state specifically was not infringing

(footnote cont'd)

Court stated in *Colville* that state seizures of cigarette shipments in-route to the reservation were a proper response to the non-collection of the tax from sales to nonmembers on the reservation notwithstanding the fact that the sales were exempt from the tax in question while in transit. *Colville*, 447 U.S. at 161-62. If the Indian trader wholesalers may legitimately be subjected to such remedies, then the regulatory scheme under which this recourse may be taken has *not* been summarily preempted by federal law. Accordingly, it is not sufficient, as the Court of Appeals has done, to interpose the Indian trader statutes between the New York regulations and their objective without further analysis.

(footnote cont'd from previous page)

upon Indian self-rule: "While the tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 156-57. What was at stake with respect to cigarette sales to nonmembers of the tribes was the marketability *vel non* of the tribe's own tax exemption to nonmembers. As Petitioners justly emphasize, Petition for Writ of Certiorari at 17, this Court remarked broadly that no principles of federal Indian law made marketable such an exemption "to persons who would normally do their business elsewhere." *Colville*, 447 U.S. 134 at 155.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Dated this 14th day of December, 1993, at Hartford, Connecticut.

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No. 93-377

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,
against
MILHELM ATTEA & BROS., INC.,
Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York, *et al.*,
Petitioners,
against
ELIAS ATTEA, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NEW YORK ASSOCIATION OF CONVENIENCE STORES, INDEPENDENT PETROLEUM MARKETERS OF NEW YORK, INC. AND SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CONVENIENCE STORES, NEW YORK ASSOCIATION OF CONVENIENCE STORES, INDEPENDENT PETROLEUM MARKETERS OF NEW YORK, INC., AND SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA IN SUPPORT OF PETITIONERS

The National Association of Convenience Stores, New York Association Of Convenience Stores, Independent Petroleum Marketers Of New York, Inc. and Society Of Independent Gasoline Marketers Of America submit this

brief as *Amici Curiae* in support of petitioners James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, and the Department of Taxation and Finance of the State of New York.[1/]

INTEREST OF *AMICI CURIAE*

The National Association of Convenience Stores, founded in 1961, is a non-profit trade association representing nearly 1,500 retailers operating convenience stores throughout the United States. These retailers provide consumers with convenient locations to quickly purchase a wide array of products and services, including tobacco, soda, candy, baked goods and snack foods. Nearly 27 percent of the typical convenience store's merchandise sales are tobacco products. Consumers who initially go to these stores to buy tobacco products typically make additional impulse purchases of goods which they then recognize they need. The convenience stores rely heavily on these supplemental purchases. A significant number of convenience stores are located near Indian reservations. These stores are in direct competition with stores selling tobacco products on these reservations.

The New York Association of Convenience Stores is a non-profit corporation representing the collective interests of small retail businesses that sell cigarettes, petroleum and other products in New York. The Independent Petroleum Marketers of New York, Inc. is a non-profit corporation that represents the interests of small businesses that sell petroleum, cigarettes and other products, primarily at retail, in New York State. The Society of Independent Gasoline Marketers of America is a national trade association representing independent marketers and chain retailers of motor fuel in the United States, most of whom operate convenience stores in conjunction with their fuel outlets. Many of the businesses that these groups represent compete for retail sales of cigarettes to non-Indian consumers with businesses operated by Indians on reservations.

New York Tax Law § 471(1) imposes an excise tax on all cigarettes purchased in New York. The tax is paid by the purchase of stamps affixed to the cigarette packages as a precondition to the first taxable sale by a wholesaler or distributor. The tax is added to the selling price of the cigarettes along the distribution chain and is ultimately added to the retail price charged the customer. The members of the *Amici* collect these taxes from consumers on their retail sales of cigarettes.

Because Indians and Indian tribes are exempt from State taxation within their own territory, wholesale dealers may sell them unstamped cigarettes. These cigarettes are substantially cheaper than cigarettes purchased outside of the reservation. Non-Indian purchasers are required to pay the tax. However, it is well known that Indian sellers make no attempt to collect this tax from non-Indian purchasers. Consequently, many non-Indians travel to Indian reservations to buy unstamped cigarettes and avoid the sales tax. This widespread conduct threatens to destroy businesses near the reservations who depend upon purchases of tobacco and gasoline products to survive.

In an effort to prevent this pervasive evasion of the sales tax, the New York State Commissioner of Taxation

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1/ This brief is filed with the permission of the parties. Written consents have been provided to the Clerk of this Court.

and Finance adopted regulations designed to collect the tax from non-Indian purchasers. These regulations will also prevent Indian retailers from wrongfully using the tax exemption and unfairly competing with stores outside the reservations. Briefly, these regulations permit Indian retailers to purchase an unlimited number of taxed cigarettes, advancing the tax to their wholesale suppliers and recovering the tax from the non-Indian purchaser. The Indian retailers may also purchase untaxed cigarettes, for resale to Indians, in an amount equal to the approximate number of Indian consumers serviced by the retailer. The wholesalers selling to the Indian retailers are required to document their sales of untaxed cigarettes and collect "tax exemption coupons" issued by the State for every purchase of untaxed cigarettes by Indian retailers.

The *Amici* have a direct and vital economic interest in the enforcement of the New York regulations, and similar regulations throughout the country.[2/] Retailers represented by these associations compete with Indian retailers for retail sales of cigarettes to non-Indian consumers. Indian retailers have historically refused to collect the applicable State taxes on cigarettes sold to non-Indians and aggressively market their exemption from State taxation to non-Indian purchasers by selling cigarettes at inordinately low "discount" prices. These artificially low prices divert non-Indian purchasers away from the stores operated by non-Indian retailers near the reservations.

2/ A list of other associations representing retailers across the country who compete with on-reservation Indian businesses for retail sales of cigarettes to non-Indian purchasers, and who urge this Court to reverse the decision of the New York State Court of Appeals, is set forth in the Appendix to this brief.

Non-Indian retailers lose significant revenue that would have been generated by their cigarette sales but for the Indian retailers' illegal discounts. In fact, retailers in New York, where the tax on cigarettes is currently 56 cents on every package of 20 cigarettes, and across the country lose millions of dollars in cigarette sales each year because of the unlawful competitive advantage Indian retailers create for themselves by refusing to collect the applicable State tax.

The low-cost prices on cigarettes offered by Indian retailers also seriously reduce the sales of other products sold by the *Amici's* members. Surveys indicate that the average cigarette smoker purchases cigarettes from convenience stores approximately three times per week. This is more than three times the number of visits per week by non-smokers. Moreover, as a result of the stores' convenient geographic locations and extensive inventory of goods, these cigarette smokers also purchase products such as soft drinks, newspapers, magazines, coffee and bakery items at the same time they purchase cigarettes. By offering discount prices on cigarettes, Indian retailers lure customers away from non-Indian retailers' stores and thereby decrease the amount of money these customers spend on cigarettes and other products. The stores' overall revenue level declines and their profitability weakens. In some cases, retailers located in close proximity to Indian retailers have been forced to go out of business because of this unfair competition.

Amici urge this Court to uphold the New York regulations to protect the rights of their members and enable them to compete on an equal basis with on-reservation Indian retailers. Unless the New York regulations are upheld, legitimate businesses who follow the

law will continue to face unfair and inequitable competition by Indian retailers who refuse to collect valid State taxes from non-Indian purchasers of cigarettes.

SUMMARY OF ARGUMENT

The decision of the New York State Court of Appeals should be overruled, and the constitutionality of the New York regulations affirmed, because this Court's decisions in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980); and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), expressly authorize New York's regulations. Specifically, this trilogy of cases permits the State to require retail outlets selling cigarettes on Indian reservations and their wholesale suppliers to comply with regulations which (1) limit the quantity of untaxed cigarettes which Indian retailers may purchase; (2) require Indian retailers to advance a tax to their wholesale suppliers for the cigarettes purchased for resale to non-Indian consumers; and (3) impose minimal recordkeeping and reporting burdens on the retailers' wholesale suppliers.

ARGUMENT

This Court has consistently held that states may impose a tax on non-Indian purchasers of cigarettes from Indian retail outlets, and may require the Indian retailers to assist in collecting the tax. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-83 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151 (1980). Moreover, these cases hold that states can also require the *wholesaler suppliers* who sell cigarettes to these Indian retailers to comply with state

regulations whose purpose is to prevent non-Indian consumers from evading the state tax. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). *See also Colville*, 447 U.S. at 159-61. The decision by the New York Court of Appeals that New York's regulations directed at wholesale suppliers are preempted by the Indian trader laws and are unconstitutionally burdensome is flatly inconsistent with this Court's prior opinions.

A. The New York Regulations Are Not Preempted By The Indian Trader Laws

1. This Court Has Repeatedly Upheld Similar Regulatory Schemes

In *Moe*, the Court addressed a Montana law which required Indian sellers of cigarettes to collect a state sales tax imposed upon non-Indian cigarette purchasers. The tax scheme required the Indian seller to pay the tax to the wholesaler from whom it purchased the cigarettes, and then add the tax to the purchase price of the cigarettes for payment by the ultimate non-Indian purchaser. *Moe*, 425 U.S. at 482. The Court emphasized that nothing in the law "runs afoul of any congressional enactment dealing with the affairs of Indians" because the ultimate burden of the "tax" was on the non-Indian purchaser. *Id.* at 483. The Court distinguished *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), relied upon below by the Court of Appeals, on the ground that the 2% tax levied by the State of Arizona on gross sales by Indian traders to reservation Indians was imposed *directly* on such sales and not on the ultimate non-Indian consumer. The Court expressly approved a regulatory scheme which was merely a "minimal burden" on Indian retailers designed to prevent

non-Indian purchasers from avoiding a concededly lawful tax. *Id.*

The Court reaffirmed the principles announced in *Moe* four years later in *Colville*, and expressly sanctioned a state's power to require the assistance of Indian retailers *and* their wholesale suppliers to collect validly enacted state taxes from non-Indians purchasing cigarettes on the reservation. At issue in *Colville* was a Washington State law which imposed extensive recordkeeping requirements on the retailers' wholesale suppliers and required Indian retailers to collect a cigarette excise tax from non-Indian purchasers. The law was enacted to prevent Indian retailers from offering their own exemption from state taxation to non-Indian cigarette purchasers. Because the "legal incidence of the tax is on the . . . non-Indian buyer," *Colville*, 447 U.S. at 141-42, the Court found that the wholesaler/Indian retailer relationship was not impermissibly interfered with by the regulations. The Court specifically considered the impact of the Indian trader laws and rejected the preemption argument relied upon by the New York Court of Appeals:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155. The Court went on to authorize the State to regulate the actions of the Indian retailers' wholesale suppliers by requiring the suppliers to keep detailed records regarding their taxable and nontaxable sales to Indian retailers. *Id.* at 160. Moreover, the Court even went so far

as to permit the State to seize untaxed cigarettes in transit from wholesalers if the Indian retailers refused to cooperate in the collection of State taxes. *Id.* at 161-62. There was not the slightest suggestion in this opinion that the Indian trader laws preempted these regulatory requirements.

In *Potawatomi*, the Court further solidified the principle that states may require Indian wholesale suppliers to assist in collecting valid state taxes. In that case, the State of Oklahoma sought to impose an assessment for $2.7 million in back taxes on cigarette sales against a convenience store owned and operated by the Potawatomi Tribe. The Tribe claimed that its sovereign immunity prevented the State from suing it directly to collect the back taxes. While the Court agreed with this position, as it did in *Moe* and *Colville*, the Court reaffirmed its earlier holdings that Indian retailers were not exempt from assisting the State with prospective tax collection: "Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Potawatomi*, 498 U.S. at 512. The Court specifically authorized states to require wholesalers to assist in collecting these taxes:

> And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or *by assessing wholesalers who supplied unstamped cigarettes to the tribal stores*.

Id. at 514 (emphasis added; citations omitted).

2. The Court Of Appeals' Decision Is Wrong

The decision of the New York State Court of Appeals is in direct conflict with *Moe*, *Colville* and *Potawatomi*. The lower court relied upon this Court's prior decision in *Warren Trading Co.* for its conclusion that the New York regulations are preempted by the federal Indian trader laws. The Court of Appeals held that despite the express language of *Potawatomi* permitting states to require wholesalers to assist in the collection of taxes, such language "did not alter the established rule stated in *Warren Trading Post v. Tax Commission* that Congress has taken the matter of regulating Indian trades so fully in hand . . . because it cites none of the relevant decisions in this area." *Milhelm Attea & Bros., Inc. v. Department of Taxation*, 615 N.E.2d 994, 1001 (N.Y. 1993). The Court of Appeals totally ignored the fact that *Warren* involved a sales tax that was levied directly on the Indian retailer. Here, the ultimate burden of the tax is indisputably on the non-Indian consumer. *Moe*, *Colville*, and *Potawatomi* authorize the State to require Indian wholesalers to assist in the collection of the excise taxes under these circumstances.

The lower court further held that this Court's statement in *Potawatomi* only meant that the "remedy" of imposing a tax directly on wholesalers could only be employed retroactively to collect unpaid taxes on past cigarette sales. This distinction makes no sense. If the Indian trader laws, or any federal law governing Indian affairs, preempt states from exercising regulatory authority over Indian traders in their dealings with Indian customers, it is irrelevant that the state seeks to exercise its authority prospectively or retrospectively. *Any* exercise of authority would be preempted. Because *Potawatomi* approves of the

State's right to collect taxes from Indian retailers by requiring wholesale suppliers to assist in the process, the Court of Appeals should be reversed.

B. The Regulations Impose Permissible Minimal Burdens On Indian Traders

State regulations that require Indian retailers and their wholesale suppliers to assist in the collection of valid state taxes are permissible if they are not unreasonably burdensome. *Moe*, 425 U.S. at 483; *Colville*, 495 U.S. at 159-60. In *Moe*, the Court characterized the requirement that Indian retailers collect the tax as a "minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe*, 425 U.S. at 483. While *Moe* did not discuss whether such a "minimal burden" could be imposed on the Indians' wholesale suppliers, a point seized upon by the Court of Appeals, there is no reason to make a distinction between retailers and wholesalers. In *Potawatomi*, the Court authorized the imposition of burdens on wholesalers supplying Indian retail outlets in order to secure the collection of valid state cigarette taxes. *Potawatomi*, 495 U.S. at 514. This is in contrast to the Court of Appeals' conclusion that every transaction between an Indian tribe and its supplier may not be regulated by the states.

Nonetheless, the Court of Appeals held that the New York regulations impermissibly place "significant" burdens on wholesalers. But the Court of Appeals gave no justification for this extraordinary conclusion. The challenged New York regulations, as applied to wholesalers, are limited in scope: they merely require that cigarette distributors making tax free sales of cigarettes to

businesses located on Indian reservations keep accurate records of their sales, keep a copy of the businesses' tax exemption certificates, and verify their sales to Indian retailers by forwarding tax exemption coupons issued by the State to the Department of Taxation and Finance. New York Comp. Codes R. & Regs. tit. 20, § 335.6(f) and (g). In contrast, the *Colville* Court approved much more arduous recordkeeping requirements which mandated that Indian retailers (1) record the number and dollar volume of taxable sales to nonmembers of the tribe; (2) with respect to nontaxable sales, record the names of all Indian purchasers, their tribal affiliations, the reservations within which the sales are made, and the dollar amount and dates of the sales; and (3) review each Indian purchaser's tribal identification card unless the purchaser is personally known to the retailer. *Colville*, 447 U.S. at 159-61.

The Court in *Colville* noted that the Indian retailers failed to present any evidence as to whether the requirements of the Washington law were overly burdensome. The Court accordingly held that the tribes failed to meet their burden of showing that the challenged tax scheme was not reasonably necessary as a means to prevent non-Indian consumers from evading taxes. *Id.* at 160. Likewise, the respondents in this case failed to present any evidence on the issue of burden, or any evidence showing that the regulations in issue were not reasonably necessary to prevent similar tax evasion in New York. Under these circumstances, the Court of Appeals erroneously determined that the New York law overstepped the boundaries of acceptable state regulation.

C. The New York Regulations Should Be Upheld Because They Protect The Valid Interests Of *Amici* And Other Non-Indian Retail Businesses In Fair Competition

The New York regulations in question should be upheld to prevent unfair competition between Indian and non-Indian retailers selling cigarettes and other consumer goods. As previously mentioned, Indian retailers historically have refused to collect valid state taxes on sales of cigarettes to non-Indian purchasers.[3/] This is done intentionally to enable Indian retailers to market their exemption from state taxes to non-Indian purchasers, who enjoy no such exemption, and sell cigarettes at unnaturally low prices. Both *Moe* and *Colville* recognized that Indian retailers selling untaxed cigarettes to non-Indian consumers realize an artificial competitive advantage over non-Indian retailers who are required to collect the tax. *See Moe*, 425 U.S. at 482; *Colville*, 447 U.S. at 154-56. However, the Court in *Colville* specifically stated that such actions are prohibited: "None of the federal laws concerned with fostering tribal economic development goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." *Colville*, 447 U.S. at 155.

The failure of Indian retailers to collect taxes on cigarette sales to non-Indians prevents non-Indian retailers with businesses near the reservation from effectively competing for such sales. Because *Amici's* members collect

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3/ Indian tribes often attempt to justify these actions by referring to their need to foster economic development and generate revenue for "essential governmental programs." *Colville*, 447 U.S. at 154.

all applicable State taxes on cigarettes, they simply cannot match the Indian retailers' bargain prices. These discount sales by Indian retailers to non-Indians deprive the retailers in New York and across the country of millions of dollars annually in cigarette sales that they might make but for the Indian retailers' artificially low prices.[4/] The New York regulations would compel Indian retailers to collect the State tax on cigarette sales to non-Indians, and thereby prevent the retailers from "marketing" their tax exemption to non-Indian consumers who would normally purchase cigarettes elsewhere.

The artificially low prices offered by Indian retailers also deprive retailers of the ancillary revenue generated by the sales of products non-Indian consumers purchase at the same time they buy cigarettes. Data indicates that cigarette smokers purchase cigarettes from convenience stores approximately three times per week. Moreover, these purchasers make more than three times the number of trips to convenience stores per week than do non-smokers. As a result of the stores' geographic convenience and purchasing ease, these consumers also tend to spend additional money on soft drinks, newspapers, magazines, coffee and bakery items each time they purchase cigarettes. By offering cigarettes to non-Indian consumers at bargain prices, Indian retailers wrongly divert customers away from convenience stores which do comply with the law. This results in a dramatic decrease in the volume of sales for the non-Indian retailers. In some cases, retailers who operate convenience stores near retail outlets on Indian

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4/ Recent decisions by supermarkets, drugstores and other retail entities to decrease their sales of tobacco products mean that convenience stores are often a consumer's only source for cigarettes.

reservations have closed their stores due to their low volume of business.

In sum, Congress never intended for Indian retailers to reap the windfalls that arise from their repeated sales of untaxed cigarettes to non-Indian purchasers. This Court should not perpetuate this unfairness by voiding New York's appropriate procedures to collect its taxes.

CONCLUSION

For the foregoing reasons, the *Amici* urge this Court to reverse the decision of the New York State Court of Appeals and affirm the constitutionality of the New York regulations in question.

Respectfully submitted,

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Dated: December 16, 1993

APPENDIX

APPENDIX

Arizona Petroleum Marketers Association

Arkansas Grocers & Retail Merchants Association

Georgia Oilmen's Association

Minnesota Service Station Association

Missouri Petroleum Marketers Association/
Missouri Association of Convenience Stores

Montana Petroleum Marketers Association

New England Convenience Store Association

New Mexico Petroleum Marketers Association

North Dakota Petroleum Marketers Association

Retail Grocers Association of Arizona

Retail Grocers Association of Florida

Washington Oil Marketers Association

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JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE, *et al.*,
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v.
ELIAS H. ATTEA, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Indian trader statutes, 25 U.S.C. §§ 261-64, prohibit New York from engaging in reasonable regulation of cigarette wholesalers to prevent widespread tax evasion by non-Indians.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,
v.
MILHELM ATTEA & BROS., INC.,
Respondent.

JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE, *et al.*,
Petitioners,
v.
ELIAS H. ATTEA, JR.,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the most important of such issues are those which involve state and local government tax collection schemes.

Like other States, New York has had to confront the problem of persons purchasing cigarettes in stores located on Indian reservations to evade payment of the State's excise tax. To prevent this revenue loss, estimated to be at least $65 million annually, *see* Pet. Br. 11, New York imposed various collection and record-keeping obligations on cigarette wholesalers. The New York Court of Appeals held, however, that the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empt the State's scheme. Not only is this decision inconsistent with this Court's cases interpreting the Indian trader statutes, it presents a grave threat to state efforts to design effective tax collection schemes which address this problem of tax evasion.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

New York, like other States which have Indian reservations within their borders, confronts the serious problem of tax evasion caused by non-Indians purchasing cigarettes, motor fuel, and other goods at reservation stores that do not collect state excise taxes. In New York, this revenue loss is the "largest single form of tax evasion" confronting the State, Dana Milbank, *Native Americans' State Tax Breaks Provoke Disputes*, Wall St. J., July 20, 1992, at B2 (quoting Commissioner James W. Wetzler), and is now estimated at $100 million annually.[2] *See* Pet. Br. 11 & n.4. In an effort to address this serious problem, New York devised a scheme to facilitate the collection of these indisputably valid taxes from non-Indian taxpayers.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] This figure includes $65 million in lost cigarette taxes and $35 million in lost motor fuel taxes. *See* Pet. Br. 11 & n.4.

New York's scheme for collecting cigarette excise taxes has three principal features. First, the State requires that the tax be paid through the purchase of stamps at the time of the first taxable sale by a wholesaler. *See* N.Y. Tax Law § 471(2). This obligation applies to all wholesalers regardless of whether they supply Indian or non-Indian retailers. *See id.* Second, in recognition that enrolled Indians cannot be taxed on cigarettes they purchase on their reservations for their own consumption, New York allows Indian retailers to purchase tax exempt (unstamped) cigarettes. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.6. To protect against tax evasion by non-exempt persons,[3] New York nominally limits Indian retailers to purchasing an amount equal to the "probable demand of qualified consumers in the trade territory." N.Y. Comp. Codes R. & Regs. tit. 20, §§ 335.6(d); 335.7(c) & (d). New York also requires wholesalers to obtain approval from either the tribe or the State as to the amount of untaxed cigarettes to be sold. *See id.* § 335.7(b)-(d). Finally, New York requires wholesalers to maintain certain records of both their taxable and tax exempt cigarette sales. *See id.* § 335.6(g); N.Y. Tax Law § 474(4).

Relying on this Court's decision in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the New York Court of Appeals held that the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empted the State's scheme for collecting excise taxes due on sales to non-Indians. According to the court, the State's collection scheme is an invalid "attempt[] to regulate in an area which Congress has taken 'fully in hand' " and "impinges on the federal interest, as evidenced by the Indian trader statutes, to 'comprehensively . . . regulate the businesses selling goods to reservation Indians.' " Pet. App.

[3] This Court's decisions establish that both non-Indians and those Indians who are not enrolled in the tribe are subject to state taxation. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 160-61 (1980). Accordingly, this brief uses the terms non-exempt and non-Indians interchangeably to refer to those persons subject to the State's taxes.

11 (citations omitted). The court further reasoned that the State's scheme "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *Id.* at 11-12 (quoting 25 U.S.C. § 261). Moreover, the court reasoned that the State's scheme imposes "financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian commissioner." *Id.* at 12 (quoting *Warren Trading Post*, 380 U.S. at 691).

SUMMARY OF ARGUMENT

Because "traditional notions of Indian self-government are . . . deeply engrained in our jurisprudence," *Ramah Navajo School Bd. v. Bureau of Rev.*, 458 U.S. 832, 837 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)), the Court has generally eschewed reliance on "standards of pre-emption developed in other areas" in favor of a balancing approach examining "the relevant state, federal and tribal interests." *Id.* at 838 (citing *White Mountain*, 448 U.S. at 143-45). Accordingly, where federal statutes are designed to "promot[e] tribal independence and economic development," the Court has generally applied a presumption against the exercise of state authority. *Id.* at 838; *see also Rice v. Rehner*, 463 U.S. 713, 719-20 (1983). Where state regulation does not implicate a traditional aspect of tribal sovereignty, however, the Court has not "appl[ied] a presumption of a lack of state authority," *Rice*, 463 U.S. at 726, but instead looked only for conflict between the state and federal schemes. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976) (quoting *United States v. McGowan*, 302 U.S. 535, 539 (1938)); *cf. Rice*, 463 U.S. at 726.

The Indian trader statutes do not confer any direct benefit on the Indian tribes. And the Court's decisions in

Moe and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), foreclose any argument that notions of tribal sovereignty and economic development entitle the tribes to market an economic advantage based on tax free sales to non-exempt persons. *See Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 155-57. The circumstances of this case thus demonstrate that it is inappropriate to apply the "presumption of pre-emption" of state powers. *Rice*, 463 U.S. at 726. The Court need only determine whether New York's scheme "'conflict[s] with the federal enactment[],'" here, the Indian trader statutes. *Moe*, 425 U.S. at 483 (quoting *McGowan*, 302 U.S. at 539).

None of the principal features of New York's scheme conflicts with any provision of the Indian trader statutes. New York does not assert any power which even arguably implicates the federal government's authority to regulate the selection or licensing of "proper person[s] to engage in" trade with the Indians, *see* 25 U.S.C. § 262, "to prohibit the introduction of goods" into the Indian country, 25 U.S.C. § 263, or to order the forfeiture of goods introduced by unlicensed traders. *See* 25 U.S.C. § 264. And contrary to the holding of the New York Court of Appeals, the State does not assert any power which "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *See* Pet. App. 11-12 (quoting 25 U.S.C. § 261). New York does not assert authority to specify the "kind . . . of goods" which Indian wholesalers can sell to retailers. Nor does New York assert any power to "specify the quantity of" cigarettes which Indian wholesalers can sell to retailers. New York does not limit the quantity of taxed product which can be sold. And while New York nominally limits the amount of tax exempt product which wholesalers can sell to the "probable demand" of the exempt Indian tribe, *see* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.7(d)(1), federal Indian policy does not authorize the tribes "to market an exemption from state taxation to persons who would normally do their business

elsewhere." *Colville*, 447 U.S. at 155. The State can thus limit a tribe's purchases of tax-exempt product to the personal consumption of its members as a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160.

Nor does New York's requirement that wholesalers collect the tax due on non-exempt product interfere with the Commissioner's power to "specify[] . . . the prices at which [cigarettes] shall be sold." 25 U.S.C. § 261. The State does not assert any power to regulate prices; wholesalers and retailers remain free to bargain over the price of cigarettes, subject only to applicable federal regulations. Moreover, while New York requires that the excise tax "be added to and collected as part of the sales price of the cigarettes," N.Y. Tax Law § 471(3), in their ordinary meanings the terms "price" and "tax" are too distinct to conclude that section 261's purpose was to prohibit the States from requiring Indian wholesalers to collect a lawfully imposed excise tax at the time of the product's sale to Indian retailers.

Moreover, the Court has recognized that "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].'" *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). The historical context of section 261's enactment, as evidenced by the provisions of numerous treaties by which the United States guaranteed the tribes that non-Indians would not be allowed onto their reservations, *see, e.g.*, Treaty With The Crow Indians, May 7, 1868, art. 2, 15 Stat. 649, 650, as well as provisions of federal law requiring all individuals trading with the Indians to obtain licenses, Act of June 30, 1834, ch. 161 §§ 2 & 4, 4 Stat. 729-30, and prohibiting nearly all barter trade between non-Indians and Indians, *id.* § 7, 4 Stat. at 730, demonstrate that Congress did not contemplate that Indian trading posts would become centers of widespread tax evasion by non-Indians, selling them millions of dollars

a year in untaxed goods. Given the historical context of section 261's enactment, it is inappropriate to attribute to it pre-emptive force over New York's efforts to collect lawful taxes from non-Indians.

The New York Court of Appeals also erred in holding that to the extent the State collected tax on stamped cigarettes, it imposed " 'financial burdens on [the wholesalers] or the Indians with whom [they] deal . . . and could thereby disturb and disarrange the statutory plan set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.' " Pet. App. 12 (quoting *Warren Trading Post*, 380 U.S. at 691). The incidence of the tax invalidated in *Warren Trading Post* fell squarely on the Indian trader. In contrast to *Warren Trading Post*, the tax at issue here is ultimately borne by non-exempt persons when they purchase cigarettes for their own consumption. *See* Pet. App. 4; N.Y. Tax Law § 471(2). The tax is thus no different than the taxes upheld in *Moe* and *Colville*. *See Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 154-61. It is only fair that those receiving the benefit of state-provided services should not be allowed "to flout [their] legal obligation to pay the tax[es]" which fund them. *Moe*, 425 U.S. at 482.

Nor does the State's scheme frustrate the congressional purpose to protect the Indians from fraudulent or unfair prices. New York does not assert any authority to regulate prices. Moreover, because New York requires tax stamps to be affixed to each package of taxable cigarettes as well as duplicate invoices detailing the quantity and wholesale price of the items delivered for both taxable and tax-exempt product, the State's scheme does not frustrate the congressional purpose to protect against fraudulent prices. *See* N.Y. Tax Law §§ 471(2), 474(4); N.Y. Comp. Codes R. & Regs., tit. 20, § 335.6(g)(2).

The New York Court of Appeals also erred in relying on *Warren Trading Post* to hold that the State's scheme was pre-empted because it "attempts to regulate in an area which Congress has taken 'fully in hand.' " Pet. App.

11 (quoting 380 U.S. at 690). While in *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court relied on *Warren Trading Post* for the proposition that the Indian trader statutes occupy the field so as to foreclose state regulation, the Court's decisions in *Moe* and *Colville* make clear that States can impose requirements on Indian traders so long as they are "reasonably necessary as a means of preventing fraudulent transactions." *Colville*, 447 U.S. at 160. Because New York's requirements meet this standard, its scheme is not pre-empted.

ARGUMENT

I. NEW YORK'S TAX COLLECTION SCHEME IS NOT PRE-EMPTED UNLESS IT CONFLICTS WITH THE INDIAN TRADER STATUTES

This Court has long recognized that no function of state government is more essential to its sovereignty than the administration and collection of tax revenues. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 560 (1830); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819). As the Court stated in *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1870):

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

78 U.S. (11 Wall.) at 110. In a long line of cases, the Court has accordingly "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981); *see also United States v. California*, 113 S. Ct. 1784 (1993); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Mathews v. Rodgers*, 284 U.S. 521 (1932); *First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450 (1924).[4]

The question presented in this case—whether the Indian trader statutes, 25 U.S.C. §§ 261-64, pre-empt New York's administrative scheme for preventing widespread evasion of valid excise taxes by non-Indian purchasers of cigarettes—counsels a similar approach. As the Court recently reaffirmed, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991). A State's efforts to address widespread evasion of lawful taxes is within these sovereign powers.

To be sure, the regulation of commerce with the Indian tribes has long been an important federal concern. In recognition that "traditional notions of Indian self-government are . . . deeply engrained in our jurisprudence," *Ramah Navajo School*, 458 U.S. at 837 (quoting *White Mountain*, 448 U.S. at 143), the Court has generally eschewed reliance on "standards of pre-emption developed in other areas" in favor of a balancing approach examining "the relevant state, federal and tribal interests." *Id.* at 838 (citing *White Mountain*, 448 U.S. at 143-45). Thus, in cases implicating tribal sovereignty interests, the Court has frequently recast the presumption against pre-emption of state authority into a presumption against the exercise of state authority. *See, e.g., id.; White Mountain*, 448 U.S. 142-45. As the Court stated in *Ramah Navajo School*, in such cases "ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly

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[4] These cases generally did not involve questions of statutory construction but rather the Court's equitable discretion in declining to exercise jurisdiction, *see, e.g., Fair Assessment*, 454 U.S. at 113-16; or the exercise of common law adjudication. *See, e.g., California*, 113 S.Ct. at 1787-90. But this principle is validly applied here where a federal statute assertedly pre-empts a State from addressing widespread evasion of a lawfully imposed tax.

announced an intention to pre-empt state activity." 458 U.S. at 838 (citing *White Mountain*, 448 U.S. at 143-44, 150-51). Thus, at times the Court has stated that State law is pre-empted " 'except where Congress has expressly provided that State laws shall apply.' " *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171 (1973) (quoting Felix Cohen, *Federal Indian Law* 845 (1958 ed.)).

Nonetheless, where state regulation does not implicate a traditional aspect of tribal sovereignty, the Court has not "appl[ied] a presumption of a lack of state authority." *Rice*, 463 U.S. at 726. The nature of the federal legislation at issue here and the absence of any tradition of tribal sovereignty authorizing sales to non-Indians free from valid state excise taxes demonstrate the inappropriateness in this case of applying the "presumption of pre-emption." *Id.* at 724-26.

Unlike those congressional enactments designed to "promot[e] tribal independence and economic development," *Ramah Navajo School*, 458 U.S. at 838, the Indian trader statutes were aimed principally at providing the federal government with a means of controlling the lawlessness of white settlers. *See* Francis P. Prucha, *American Indian Policy In The Formative Years* 48 (1962).[5] And

[5] As Professor Prucha wrote concerning the Indian trader statutes' predecessors:

> The genesis of the first trade and intercourse acts is clear. The laws were necessary to provide a framework for the trade —to establish a licensing system which would permit some control and regulation—but this was merely a restatement of old procedures. The vital sections of the laws dealt with the crisis of the day on the frontier. They sought to provide an answer to the charge that treaties with the Indians, which guaranteed their rights to the territory behind the boundary lines, were not respected by the United States. The laws were not "Indian" laws; they touched the Indian only indirectly, as they limited him in his trade and his sale of land. The legislation was, rather, directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians.

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the Court's decisions in *Moe* and *Colville* foreclose any argument that notions of tribal sovereignty and economic development entitle the tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at 155; *see also Moe*, 425 U.S. at 482-83. In short, federal Indian policy is not premised on the notion that the Indian tribes are entitled to benefit from the tax evasion of persons lawfully subject to state taxing authority. *Cf.* 4 U.S.C. §§ 104-06, 109 (providing that persons other than Indians are not exempt from state income or sales and use taxes for activities occurring on reservations). And given Congress's recognition of the importance of minimizing disruption to state systems for the administration and collection of tax revenues, *see, e.g.*, 28 U.S.C. § 1341 (Tax Injunction Act); 4 U.S.C. §§ 104-111 (Buck Act), the Court should not construe the silence of, or any ambiguities in, the Indian trader statutes as pre-empting New York's scheme. *Cf. Gregory*, 111 S. Ct. at 2403; *United States v. Bass*, 404 U.S. 336, 349 (1971).

The consequences of doing otherwise are simply too great. By the State's estimate, it loses approximately $65 million in cigarette tax revenues on an annual basis. Pet. Br. 11. And while not at issue in this case, the State has likewise lost substantial motor fuel excise tax revenues currently estimated at $35 million annually because of a similar holding of the New York Court of Appeals. *See* Pet. Br. 11 n.4; *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 69 N.Y.2d 536 (1987). Thus, estimates place the revenue loss at $100 million annually. *See* Pet. Br. 11 & n.4; James Dao, *Ruling Scuttles Plan to Collect Taxes on Reservation Sales*, N.Y. Times, June 11, 1993, at B5. The situation the State confronts is compounded by the assertion of various tribes that the State "has no power or authority to regulate these transactions on the reservations," Br. *Am. Cur.* Seneca Nation of Indians *et al.* (cert. stage) 4, and the refusal of some Indian retailers to collect these taxes. *See, e.g., Snyder v. Wetzler*, 1993

N.Y. App. Div. LEXIS 10523 (Nov. 10, 1993).[6] Accordingly, a holding that the Indian trader statutes pre-empt the State's scheme will, with respect to New York, render illusory *Moe*'s and *Colville*'s affirmation of state authority to collect taxes on sales to non-exempt persons.

New York seeks to use minimally intrusive means to collect from non-Indians a valid excise tax which does not implicate tribal sovereignty interests. In these circumstances, it is inappropriate to apply the "presumption of pre-emption" of state powers. *See, e.g., Rice,* 463 U.S. at 726. Accordingly, under the Court's precedents, the relevant inquiry is whether New York's scheme " 'conflict[s] with the federal enactments,' " here, the Indian trader statutes. *Moe,* 425 U.S. at 483 (quoting *United States v. McGowan,* 302 U.S. 535, 539 (1938) and citing *Thomas v. Gay,* 169 U.S. 264, 273 (1898)). *See also Ramah Navajo School,* 458 U.S. at 847-48 (Rehnquist, J., dissenting); *Central Machinery,* 448 U.S. at 168 (Stewart, J., dissenting); *cf. Rice,* 463 U.S. at 726 (where tribal sovereignty interests are not implicated, Court has "only to determine whether application of . . . state . . . laws would 'impair a right granted or reserved by federal law' ") (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973)).

A careful examination demonstrates that this case presents no conflict between the state and federal schemes. Indeed, the notion that Congress's purpose in enacting the Indian trader statutes was to pre-empt the States in such a functionally important area of sovereignty as the collection of lawfully imposed taxes from non-Indians is difficult to reconcile with the historical context of § 261's

[6] *Snyder* involves a state assessment against Barry E. Snyder, Sr., head of the 6,000 member Seneca Nation, and operator of the "Seneca Hawk" store on the Cattaraugus Reservation, for $6.3 million in uncollected sales and excise taxes on cigarettes and gasoline for the year 1989. *See* Gary Spencer, *State Wins Sales, Excise Tax Ruling Against Indians,* N.Y. Law Journal, Nov. 22, 1993, at 1. The State also has assessments pending against five other Indian retailers. *Id.*

enactment. *See, e.g., Central Machinery,* 448 U.S. at 166 (Indian trader statutes must be interpreted "in light of the intent of the Congress that enacted them[.]"); *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 666 (1979) ("Legislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].' ") (quoting *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 206 (1978)).

Nonetheless, the New York Court of Appeals relied on this Court's decision in *Warren Trading Post* to hold that the Indian trader statutes pre-empted the State's tax collection scheme. According to the court, the State's collection scheme "attempts to regulate in an area which Congress has taken 'fully in hand' " and "impinges on the federal interest, as evidenced by the Indian trader statutes, to 'comprehensively . . . regulate businesses selling goods to reservation Indians.' " Pet. App. 11 (internal citations omitted). The court further reasoned that the State's scheme "impinges on" the federal government's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.' " *Id.* at 11-12 (quoting 25 U.S.C. § 261). Moreover, the court concluded that the State's scheme imposes "financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 12 (quoting *Warren Trading Post,* 380 U.S. at 691).

The net effect of the decision is to frustrate the State's ability to collect revenues in an effective and minimally intrusive manner. Yet the design of a State's tax administration and collection scheme surely "is a decision of the most fundamental sort for a sovereign entity," *Gregory,* 111 S. Ct. at 2400, for the State's very existence depends upon it. This untoward result is indefensible

given the absence of any conflict between the State's scheme and the Indian trader statutes. And it is truly regrettable given the State's substantial interest in collecting indisputably valid taxes and the absence of any tribal sovereignty interest in profiting from the evasion of these taxes. *See Colville*, 447 U.S. at 155; *Moe*, 425 U.S. at 482-83.

II. THE INDIAN TRADER STATUTES DO NOT EVIDENCE A CONGRESSIONAL PURPOSE TO PROHIBIT THE STATES FROM ENGAGING IN REASONABLE REGULATION OF INDIAN WHOLESALERS TO PREVENT TAX EVASION BY NON-INDIANS

A. *Moe* and *Colville* Establish the Validity of New York's Scheme

Before analyzing the various provisions of the State's collection scheme, it is worthwhile to revisit this Court's decisions in *Moe* and *Colville*. These cases upheld the validity of taxes similar to those imposed here and the right of the States to impose minimal burdens on Indian retailers. No valid basis exists for distinguishing them.

In *Moe*, this Court held that a State could require an "Indian seller doing business on tribal land" to collect state taxes on the sales of cigarettes to non-Indian purchasers. 425 U.S. at 481-82. In so holding, the Court specifically rejected the tribe's contention that the State's imposition of a collection duty on Indian sellers for taxes owed by non-Indian purchasers was a "gross interference with [its] freedom from state regulation" under *Warren Trading Post*, *id.* at 482, noting that the tax was "validly imposed" and the collection obligation was a "minimal burden." *Id.* at 483.

In *Colville*, the Court upheld a state law requiring tribal smokeshops to collect cigarette taxes from non-Indians as well as non-enrolled Indians who lived on the reservation. The Court rejected the tribe's arguments that the State's law was pre-empted by various federal Indian laws including the Indian trader statutes, was inconsistent

with the principle of tribal sovereignty, and was invalid under the Indian Commerce Clause. 447 U.S. at 154-160. *Moe* and *Colville* thus establish the validity of the taxes which New York seeks to collect.

Of course, in both *Moe* and *Colville* the State sought to impose the collection (and attendant record-keeping and licensing) obligations on the Indian retailer rather than the wholesaler. But given that the Court has already recognized that such obligations impose at most a "minimal burden" on the Indian retailer, *see Colville*, 447 U.S. at 159; *Moe*, 425 U.S. at 483; *cf. Rice*, 463 U.S. at 715 (upholding State's authority to require licensed Indian trader to obtain liquor license because of sales to non-Indians), it is not plausible to suggest that New York's decision to place the collection and record-keeping obligation on the wholesaler is significant enough to render its scheme pre-empted. Imposing the collection and record-keeping obligations on the wholesaler rather than the retailer does not make these burdens any more substantial than those upheld in *Moe* and *Colville*. To the contrary, because there are far more transactions at the retail rather than the wholesale level, the collection and record-keeping requirements upheld in *Colville* are far more burdensome than those imposed by New York's scheme. Indeed, *Colville*'s upholding of the State's right to require Indian retailers to keep detailed records of their transactions with tax-exempt Indians, *see* 447 U.S. at 159, transactions which are as much a part of the Indian trade as those between the wholesaler and retailer, should foreclose any argument that the Indian trader statutes pre-empt a State from placing such obligations on the wholesaler. And the holding below is all the more remarkable given this Court's recent statement in *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 111 S.Ct. 905, 912 (1991), that States can collect cigarette taxes from Indian wholesalers. In any event, the Indian trader statutes do not evidence a congressional purpose to displace New York's tax collection scheme.

B. New York's Scheme Does Not Conflict with the Indian Trader Statutes

New York's scheme for collecting cigarette excise taxes has three principal features. First, the State requires that the tax be paid through the purchase of stamps at the time of the first taxable sale by a wholesaler. *See* N.Y. Tax Law § 471(2). This obligation applies to all wholesalers regardless of whether they supply Indian or non-Indian retailers. *See id.* Second, in recognition that enrolled Indians cannot be taxed on cigarettes they purchase on their reservations for their own consumption, New York allows Indian retailers to purchase tax exempt (unstamped) cigarettes. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.6. To protect against tax evasion by non-Indians, New York nominally limits Indian retailers to purchasing an amount equal to the "probable demand of qualified Indian consumers in the trade territory." N.Y. Comp. Codes R. & Regs. tit. 20, §§ 335.6(d); 335.7(c) & (d). New York also requires wholesalers to obtain approval as to the amount of untaxed cigarettes to be sold from either the tribe or the State. *See id.* § 335.7(b)-(d). Finally, New York requires wholesalers to maintain certain records of their tax exempt cigarette sales. *See id.* § 335.6(g).[7]

In holding that the State's scheme was pre-empted, the New York Court of Appeals articulated three reasons. Relying on the language of 25 U.S.C. § 261, the court reasoned that the State's scheme "impinges on the authority of the Commissioner of Indian Affairs to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" Pet. App. 11-12 (quoting 25 U.S.C. § 261). The court further reasoned that "to the extent that the sales tax is imposed on all stamped cigarettes, the regulations place 'financial burdens on [the wholesalers] or the Indians with whom [they] deal [] in addition to those Congress or the tribes have

[7] New York also imposes record-keeping requirements on taxable sales of cigarettes. *See* N.Y. Tax Law § 474(4).

prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 12 (quoting *Warren Trading Post*, 380 U.S. at 691). Finally, the court reasoned that the State was attempting to regulate in a field which Congress "has taken 'fully in hand.'" *See id.* at 11 (quoting *Warren Trading Post*, 380 U.S. at 690). None of these reasons can withstand scrutiny.

1. *New York's Scheme Does Not Impinge on the Commissioner's Authority Under the Indian Trader Statutes*

Beginning with the First Congress, the federal government has regulated trade with the Indian tribes. *See* Act of July 22, 1790, 1 Stat. 137. As a leading authority explains, trade with the Indian tribes "presented unlimited opportunities for corruption and extortion." Felix Cohen, *Handbook of Federal Indian Law* 348 (1942). The Indian trade laws were thus "directed against the lawless whites on the frontier" and "touched the Indian only indirectly." Prucha, *American Indian Policy* 48. While these laws have undergone various revisions throughout their history, one of their overarching purposes has been to protect Indian tribes from fraudulent practices. *See Central Machinery Co.*, 448 U.S. at 165 (noting that "[o]ne of the fundamental purposes of these statutes and regulations [is] to protect Indians from becoming victims of fraud in dealings with persons selling goods"); H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834) (noting that "[t]he Indians do not meet the traders on equal terms, and no doubt have much reason to complain of fraud and imposition"); *id.* at 95 (report of commissioners) (estimating "the average profits charged on goods in the Indian country at 100 per cent").[8]

In their current version, the Indian trader statutes, 25 U.S.C. §§ 261-64, contain four provisions. These provi-

[8] *See also id.* at 96-97 (detailing disparities between cost of various goods and prices at which sold to the Indians).

sions govern the "[p]ower to appoint traders with Indians," *id.* § 261; the "[p]ersons permitted to trade with Indians," *id.* § 262; the "[p]rohibition of trade by President," *id.* § 263; and "[t]rading without license." *Id.* § 264. At the outset, *amici* submit that none of the principal features of New York's tax collection scheme even arguably implicates the federal government's power to regulate the selection or licensing of "proper person[s] to engage in" trade with the Indians, *see id.* § 262, "to prohibit the introduction of goods" into the Indian country, *see id.* § 263, or to order the forfeiture of goods introduced by unlicensed traders. *See id.* § 264. Accordingly, the only provision of the Indian trader statutes at issue in this case is section 261. This section provides in relevant part:

> The Commissioner of Indian Affairs shall have the sole power and authority to . . . make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

25 U.S.C. § 261.

Relying on this provision, the New York Court of Appeals held that the State's scheme "impinge[d] on" the Commissioner's authority "to determine 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" Pet. App. 11-12 (quoting *id.*). But contrary to the decision of the court below, none of the features of New York's tax collection scheme impinges on the Commissioner's authority to "specify[] the kind and quantity of goods and the prices at which such goods shall be sold to the Indians" within the ordinary meaning of these terms.

New York, of course, does not assert that it has the power to dictate the "kind . . . of goods" which Indian wholesalers can sell to Indian retailers. Nor does New York assert the power to "specify the . . . quantity of" cigarettes which Indian wholesalers can sell to Indian

retailers. New York does not limit the amount of taxed product which Indian wholesalers can sell to Indian retailers. To be sure, New York nominally limits the amount of untaxed cigarettes which Indian wholesalers can sell to the "probable demand" of the exempt nation or tribe. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 335.7(d)(1). But it is incorrect to suggest, as the court below did, that this impinges on the Commissioner's authority to determine the "quantity of goods" that can be sold to the Indians. As the Court noted in *Colville*, federal Indian policy does not authorize Indian tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere." 447 U.S. at 155. The State can thus limit the tribes' purchases of tax-exempt products to the personal consumption of their members as a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160. New York's provision that the tribes consult with the State regarding their evidence of the probable demand of their enrolled members, *see* N.Y. Comp. Codes R. & Regs., tit. 20, § 335.7(d)(2)(i), is no more burdensome than the scheme upheld in *Colville*, which required retailers to "record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, . . . the dollar amount and dates of sales." 447 U.S. at 159. In short, this aspect of New York's scheme does not interfere with the Commissioner's authority and fully satisfies the requirement that it be a "reasonably necessary . . . means of preventing fraudulent transactions." *Id.* at 160.

Nor does New York's requirement that wholesalers collect the excise tax interfere with section 261's grant to the Commissioner of the "sole power" to "specify[] . . . the prices at which . . . goods shall be sold to the Indians." New York does not assert any authority to regulate the prices which Indian wholesalers charge Indian retailers. To the contrary, Indian wholesalers and retailers remain free to bargain over the price of cigarettes and are fully subject to the Commissioner's regulation "that the prices

charged by licensed traders [be] fair and reasonable." 25 C.F.R. § 140.22.

That New York requires Indian wholesalers to collect the tax due on non-exempt product at the time it is sold to Indian retailers does not mean that it is "specifying . . . the prices at which [cigarettes] shall be sold." 25 U.S.C. § 261. In their ordinary meanings, the terms "price" and "tax" are too distinct to conclude that Congress's purpose in enacting section 261 was not only to grant the Commissioner the sole authority to regulate prices but also to prohibit the States from requiring Indian wholesalers to collect a lawfully imposed excise tax at the time of the product's sale to Indian retailers. *Compare Black's Law Dictionary* 1188 (6th ed. 1990) (defining "price" as "[s]omething which one ordinarily accepts voluntarily in exchange for something else") *with id.* at 1457 (noting that "[e]ssential characteristics of a tax are that it is not a voluntary payment . . . , but an enforced contribution, exacted pursuant to legislative authority"); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A tax is an enforced contribution to provide for the support of the government[.]"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 80 (1868) (" 'A tax in its essential characteristics . . . is not founded on contract or agreement.' ") (citation omitted).

An excise tax can, of course, "be added to and collected as part of the sales price" of an item as New York requires. *See* N.Y. Tax Law § 471(3). But when read in light of its purpose of preventing fraud, the language of § 261 cannot be construed as pre-empting States from collecting lawfully imposed taxes at the wholesale level. To the extent a price includes the excise tax lawfully added to the wholesale price because the cigarettes are intended for resale only to non-exempt persons, surely that portion of the price attributable to the tax satisfies the Commissioner's requirement that it be "fair and reasonable." 25 C.F.R. § 140.22. Accordingly, except for where a State seeks to tax enrolled Indians, there is no

conflict between state laws placing the collection obligation on the wholesaler and section 261's grant of authority to the Commissioner to specify the prices of goods sold to Indians. *See, e.g., Moe*, 425 U.S. at 483 (quoting *McGowan*, 302 U.S. at 539 and citing *Thomas*, 169 U.S. at 273).

2. *Congress Did Not Contemplate that the Indian Trader Statutes Would Pre-empt State Efforts to Prevent Tax Evasion*

As the Court has often recognized, "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].' " *Omaha Indian Tribe*, 442 U.S. at 666 (quoting *Suquamish Indian Tribe*, 435 U.S. at 206). The Court has thus interpreted § 261 "in light of the intent of the Congress that enacted [it]." *Central Machinery*, 448 U.S. at 166 (citing *Omaha Indian Tribe*, 442 U.S. at 666; *Suquamish Indian Tribe*, 435 U.S. at 206). The historical context of section 261's enactment demonstrates that Congress could not have envisioned that non-Indians would travel onto reservations in large numbers to evade payment of lawful state taxes.

At the time of section 261's enactment in 1876, federal Indian policy was still largely marked by removal of the Indians from their lands and segregation of them on reservations. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 121-29 (1982 ed.). As the Court has recognized, it was not until 1887 when Congress adopted the General Allotment (Dawes) Act, 24 Stat. 388, that "the eventual assimilation of the Indian population and the 'gradual extinction of Indian reservations and Indian titles' " became the central tenets of federal Indian policy. *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) (quoting *Draper v. United States*, 164 U.S. 240, 246 (1896) and internal citation omitted); *see also* Cohen at 130 (1982 ed.).

Thus, at the time of section 261's enactment, many of the treaties and agreements which had been negotiated

with the various Indian tribes contained provisions in which the United States agreed "to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe[s]." *Montana*, 450 U.S. at 558. For example, Article II of the Treaty With The Crow Indians, May 7, 1868, 15 Stat. 649, 650 provided that "the United States now solemnly agrees that no persons, except those herein designated and authorized to do so . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the exclusive use of said Indians . . . ."[9] And in the

[9] *See also* Treaty With The Omaha Indians, Mar. 6, 1865, art. 4, 14 Stat. 667, 668 ("The whole of the lands . . . shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe."); Treaty With The Lower Brule Indians, Oct. 14, 1865, art. 6, 14 Stat. 699, 700 ("No white person, other than officers, agents or employe[e]s of the United States shall be permitted to go on or remain on the said reservation, unless previously admitted as a member of the said band according to their usages."); Treaty With The Cheyennes And Arrapahoes, Oct. 14, 1865, art. 2, 14 Stat. 703, 704 ("no white person, except officers, agents, and employees of the Government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages"); Treaty With The Camanches And Kioways, Oct. 18, 1865, art. 2, 14 Stat. 717, 718 (same); Treaty With The Choctaws And Chickasaws, Apr. 28, 1866, art. 43, 14 Stat. 769, 779 (same); Treaty With The Cherokee Indians, July 19, 1866, art. 27, 14 Stat. 799, 806 ("all persons not in the military service of the United States, not citizens of the Cherokee nation, are to be prohibited from coming into the Cherokee nation"); Treaty With The Ute Indians, Mar. 2, 1868, art. 2, 15 Stat. 619, 620 ("no persons, except those herein authorized so to do, and except such officers, agents, and employe[e]s of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the" reservation); Treaty With The Sioux Indians, Apr. 29, 1868, art. 2, 15 Stat. 635, 636 (same); Treaty With The Navajo Indians, June 1, 1868, art. 2, 15 Stat. 667, 668 (same); Treaty With The Shoshonees And Bannacks, July 3, 1868, art. 2, 15 Stat. 673, 674 (same).

Trade and Intercourse Act of 1834, Congress, in addition to requiring licenses to trade with the Indians, prohibited non-Indians from obtaining through barter with the Indian tribes any goods except skins and furs, a provision which remained in effect until 1953. Act of June 30, 1834, ch. 161, §§ 2, 4, & 7, Stat. 729, 730.[10]

In 1876, federal policy thus greatly circumscribed trade and intercourse between Indians and non-Indians.[11] The historical context of section 261's enactment demonstrates that Congress did not contemplate that Indian trading posts would become centers of widespread tax evasion by non-Indians, selling millions of dollars a year in untaxed goods to them. Because section 261 " 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted' " it, *Omaha Indian Tribe*, 442 U.S. at 666 (quoting *Suquamish Indian Tribe*, 435 U.S. at 206), it is inappropriate to attribute to it pre-emptive force over New York's effort to collect lawful taxes. *Cf. Gregory*, 111 S. Ct. at 2403; *Bass*, 404 U.S. at 349.

[10] The exception for skins and furs stems from § 7 of the Act of Apr. 18, 1796, Ch. 13, 1 Stat. 452, 453, and likely owed to the great economic and political significance of the fur trade.

This provision was repealed by the Act of Aug. 15, 1953, Ch. 506, § 1, 67 Stat. 590.

[11] At the time of section 261's enactment, several other provisions of the 1834 act which greatly limited contact between white settlers and the Indians remained in force. *See* Act of June 30, 1834, ch. 161, § 8 (prohibiting trapping in Indian country); *id.* § 9 (prohibiting grazing without tribal consent in Indian country); *id.* §§ 10-11 (authorizing federal government to use military force to remove intruders and settlers from Indian country); *id.* § 12 (prohibiting non-governmental sale, lease, or conveyance of lands by Indians to non-Indians).

3. *Requiring Wholesalers to Collect Tax Due on Cigarettes Which Will Ultimately be Borne By Non-Indians Does Not Place an Impermissible Burden on Either Wholesalers or Retailers and Does Not Frustrate the Statutory Purpose*

The New York Court of Appeals also held that to the extent the State collected tax on stamped cigarettes, it imposed "'financial burdens on [the wholesalers] or the Indians with whom [they] deal[] in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.'" Pet. App. 12 (quoting *Warren Trading Post*, 380 U.S. at 691). The court's rationale, however, ignores not only the factual context of *Warren Trading Post*, but also this Court's decisions in *Moe* and *Colville*.

In *Warren Trading Post*, the Court held that the Indian trader statutes pre-empted a State from imposing a gross receipts/gross income tax on a licensed Indian trader which engaged in retail trading with reservation Indians. 380 U.S. at 690-91. The trader, however, did not claim that it was exempt from taxation on its sales to non-Indians. *See id.* at 686. Thus, the Court's statement in *Warren Trading Post* that the tax "would put financial burdens on [the trader] or the Indians with whom it deals," *id.* at 691, is properly read as applying only to those taxes which are ultimately borne by reservation Indians. *See Moe*, 425 U.S. at 482. This conclusion is further supported by the Court's comment that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Warren Trading Post*, 380 U.S. at 691 (footnote omitted).[12]

[12] This conclusion is also consistent with the Court's decision in *Central Machinery Co.*, which invalidated, under the Indian trader statutes, a "transaction privilege tax" imposed on the sale of farm machinery to a tribal enterprise. *See* 448 U.S. at 161-65. The tax, however, was added to the price of the machinery and was borne by reservation Indians. *Id.*

In contrast to the tax at issue in *Warren Trading Post*, New York does not place the financial burden of the excise tax on either the wholesale trader or tax-exempt reservation Indians. Rather, under New York's scheme, the tax is ultimately borne by non-exempt persons who receive the benefit of the many services the State provides. *See* Pet. App. 4 (noting that tax "is ultimately added to the retail price and is paid by the consumer"); N.Y. Tax Law § 471(2). The tax, therefore, does not "put financial burdens on [the traders] or the Indians with whom [they] deal." *Warren Trading Post*, 380 U.S. at 691; *see also Colville*, 447 U.S. at 154-61 (upholding State's authority to require tribal smokeshop to collect tax on sales to non-Indians and non-enrolled Indians); *Moe*, 425 U.S. at 482 (distinguishing *Warren Trading Post* on grounds that "[u]nlike the sales tax here, the tax was imposed directly on the seller, and . . . there was . . . no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians").[13] It is only fair

[13] *Amici* believe that the court of appeals' statement that the State's tax scheme imposed "financial burdens on [plaintiffs] or the Indians with whom [they] deal[]," *see* Pet. App. 12, was concerned solely with the burden of the tax itself and not the burden of lost sales caused by having to collect tax on sales to non-exempt persons or the cost of complying with the State's record-keeping requirements. In any event, *Moe* and *Colville* make clear that New York's tax on non-Indians purchasing goods at a reservation store is "valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Colville*, 447 U.S. at 151 (discussing *Moe*) (footnote omitted). As the Court stated in *Colville*, "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [do not] authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155; *see also Moe*, 425 U.S. at 482, 483 (noting that "the competitive advantage which the Indian seller . . . enjoys over all other cigarette retailers . . . is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax" and holding that "to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian propri-

that those individuals receiving the benefit of state provided services should not be allowed "to flout [their] legal obligation to pay the tax[es]" which fund them. *Moe*, 425 U.S. at 482.

Nor does the State's scheme disturb the Congressional purpose of protecting Indians from either fraudulent or "unfair or unreasonable" prices. *Warren Trading Post*, 380 U.S. at 691. As stated before, New York does not assert any authority to regulate the prices of goods sold to the Indians. And there can be no contention that the State's scheme frustrates the Congressional purpose because unscrupulous wholesalers might attempt to collect cigarette tax on products earmarked for purchase by tax-exempt Indians. Under New York law, tax stamps must be affixed to packages of cigarettes as evidence of payment of the tax. *See* N.Y. Tax Law § 471(2). Moreover, for each delivery, invoices (in duplicate) must detail "the number of packages and cigarettes contained therein . . . and the items and quantity and wholesale price of each item. . . ." *Id.* § 474(4); *see also* N.Y. Comp. Codes R. & Regs., tit. 20, § 335.6(g)(2) ("Every . . . invoice . . . given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to

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etor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof").

Colville likewise upheld *in toto* the State of Washington's detailed record-keeping requirements as a "reasonably necessary . . . means of preventing fraudulent transactions." *See* 447 U.S. at 160. Under Washington's scheme, Indian retailers were required to "record the number and dollar volume of taxable sales to nonmembers of the Tribe [and] [w]ith respect to nontaxable sales, . . . record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales." *Id.* at 159. Sales by retailers to tax-exempt Indians are, of course, as much a part of the Indian trade as sales by wholesalers to retailers. And New York's record-keeping requirements are no more burdensome than those upheld in *Colville*. *See* N.Y. Comp. Codes R. & Reg. tit. 20, § 335.6(g).

be paid by the exempt purchaser for such cigarettes."). The State's requirements that stamps be affixed to taxable cigarettes and invoices list the items, quantity and wholesale price of cigarettes being delivered, provides the Indian retailer with adequate protection against fraudulent overcharging. Accordingly, there is no basis for the New York Court of Appeals' conclusion that the State's scheme "could disturb and disarrange" Congress's plan to protect the Indians from "unfair or unreasonable" prices. Pet. App. 12.

4. *Decisions Subsequent to* Warren Trading Post *Demonstrate that the Indian Trader Statutes Do Not Foreclose All State Regulation of Traders*

The New York Court of Appeals also relied on *Warren Trading Post* to hold that the State's scheme was preempted because it "attempts to regulate in an area which Congress has taken 'fully in hand.'" Pet. App. 11 (quoting 380 U.S. at 690). The Court has, of course, invoked *Warren Trading Post* for the proposition that the Indian trader statutes occupy the field. *See Central Machinery*, 448 U.S. at 165-66 ("by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject'") (quoting 380 U.S. at 691 n.18). But as the four dissenting justices in *Central Machinery* explained, the Court has "rejected the contention that the Indian trader statutes occupy the field so completely as to pre-empt all state laws affecting those who trade on the reservation with reservation Indians." 448 U.S. at 167 n.1 (Stewart, J., dissenting, joined by Powell, J., Rehnquist, J., & Stevens, J.); 448 U.S. at 172 ("Our most recent cases undermine the notion that 25 U.S.C. §§ 261-264 occupy the field so as to pre-empt all state regulation affecting licensed Indian traders.") (Powell, J., dissenting).

In *Moe*, for example, a unanimous Court rejected a claim that *Warren Trading Post* barred a State from re-

quiring Indian retailers to collect tax on sales to non-Indians. 425 U.S. at 481-82. And *Colville*'s upholding of a state requirement that Indian retailers maintain detailed records of their sales to tax-exempt Indians puts to rest any claim that Congress pre-empted all state regulation of Indian trading. *See* 447 U.S. at 159-60. As *Colville* makes clear, the Indian trader statutes do not pre-empt state requirements "reasonably necessary as a means of preventing fraudulent transactions." 447 U.S. at 160. Because the State's scheme satisfies this standard, the New York Court of Appeals erred in holding that it was pre-empted.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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NO. 93-377

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

MILHELM ATTEA & BROS. INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

ELIAS H. ATTEA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, IOWA, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, to prevent the avoidance of state cigarette taxes by non-Indian consumers, the State of New York may limit the number of tax exempt cigarettes that suppliers may provide to tribal retailers on the reservation to an amount no greater than the quantity tribal members might legitimately consume and also impose upon such suppliers reasonable record-keeping and reporting requirements.

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NO. 93-377

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

MILHELM ATTEA & BROS. INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

ELIAS H. ATTEA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, IOWA, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI

Washington and the other named states submit this brief as *amicus curiae* in support of the petitioner, New York, which seeks the reversal of the judgment of the Court of Appeals of the State of New York. This brief is submitted on behalf of Washington, Arizona, California, Florida, Iowa, Montana, Nevada, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, and Wisconsin by their attorneys general. Accordingly, consent to its filing is not required. SUP. CT. R. 37.5.

The issue before the Court is whether New York may apply its cigarette tax regulations to minimize evasion of those taxes, which decisions of this Court have allowed New York and other states to collect, without the preemption of such regulations by federal statute.

The *amici* are states within whose borders are found many of the nation's Indian reservations and other geographical areas constituting Indian country. Tribes or their licensees carry on significant commercial sales activities in Indian country, marketing cigarettes to non-members as well as to tribal members in Indian country.[1] This commodity and other products sold in Indian country, such as motor vehicle fuel and liquor, represent merchandise on which states have traditionally imposed excise taxes significantly exceeding any general sales tax.[2]

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[1]Non-members of the tribe on whose reservation cigarettes are sold, like non-Indians, are subject to the state tax. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160-61 (1980) (hereinafter *Colville*). The distinction between tribal members and non-members is maintained throughout this Argument.

[2]The current rate for Washington's cigarette tax, for example, is $5.40 per carton (200 cigarettes). The State's general sales tax rate of 6.5% would produce a tax of $1.15 based upon a median price of $17.70 per carton currently found in the market.

The states have customarily provided for the prepayment of the levies from the wholesaler or other supplier or have made other provision for passing the economic burden to the ultimate consumer where the legal incidence of the tax is otherwise on the supplier of the product.[3] Precisely such prepayment requirement, a nondiscriminatory feature of the states' tax systems, has been invalidated by the Court of Appeals.

If allowed to stand, the decision of the Court of Appeals would dismantle compliance systems such as New York's and facilitate widespread tax evasion. Non-members are attracted to Indian country by the prospect of significantly lower prices on cigarettes and other products, created by the failure to collect the state tax. Retailers in Indian country resist collecting the tax; the market for these commodities does not otherwise exist. The proximity of many reservations to large population centers encourages non-member travel to these sites.[4]

Economic factors magnify the urgency of the collection problem confronting the states. Excise taxes placed on cig-

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[3]New York places the ultimate incidence and liability for its tax upon the consumer. Pet.App.11. Washington imposes its tax at the time and place of the first taxable event occurring in the state, which would include possession or handling by a licensed distributor. Wash. Rev. Code § 82.24.080. Under Washington's system, where the legal incidence of the tax in fact falls will depend upon the fact pattern in each specific case. *See Colville*, 447 U.S. at 142, n.9 for an explanation of the Washington system. This difference between the New York and Washington systems, however, is of no legal significance in the case at bar.

[4]The Agua Caliente Reservation in California includes a substantial portion of the city of Palm Springs. The Puyallup Reservation in Washington is located, in part, within one of the state's largest cities, Tacoma. Albuquerque, New Mexico is bordered on the north by the Sandia Reservation and on the south by the Isleta Reservation.

arettes and motor vehicle fuel fund crucial state programs.[5] The sharp increase in development of gambling casinos and other gaming activities in Indian country bring the prospect of increased markets for sales of cigarettes, motor vehicle fuel, and liquor to non-member consumers frequenting these venues.[6] Taken together these considerations render the position of the Court of Appeals far more than an isolated aberration. Both the result and the reasoning of the decision seriously concern the states.[7]

INTRODUCTION AND SUMMARY

1. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Court established a narrow but important exception to the general rule that state laws, including state tax laws, do not apply to Indians when on their own reservation. Under that exception, states may impose upon tribal members who make on-reservation sales to non-members the legal obligation to collect and remit to the state a tax imposed upon those non-member customers. Stated otherwise, the members have no right under federal

[5]State gasoline taxes will continue to be a primary source of funding for critically needed repairs and additions to the highway and bridge infrastructure. Earlier in 1993 the Washington legislature increased the state's cigarette excise tax from $3.40 to $5.40 per carton to partially fund a major health care measure. 1993 Wash. Laws, ch. 492, § 307. Proprosals before Congress for federal health care legislation contemplate increases in the current federal cigarette excise tax.

[6]The market share of Class III Indian games and casino gambling, as reported for 1992, more than tripled from its level in the previous year. *International Gaming & Wagering Business*, 18 (September 1993).

[7]In addition to the direct impact upon the states' own regulatory systems, the decision of the Court of Appeals may frustrate prosecutions under the federal contraband cigarette statutes conducted by the United States as an aid to state tax enforcement efforts. *See* 18 U.S.C. § 2342. There is already one reported instance where the New York court's decision has been raised as a defense to indictments brought under this federal statute. *United States of America v. Feist, et al.*, CR 92-42-M-CCL (D. Mont.).

law to "market an exemption" to their non-member customers, and to thereby frustrate the states' efforts to collect taxes validly imposed upon those customers. *Colville*, 447 U.S. at 155.

This does not mean, however, that "anything goes" in the states' efforts to collect their taxes. In decisions after *Moe*, the Court has attempted to strike a balance, which accommodates both the states' interest in collecting their legitimate taxes and the tribal members' interest in on-reservation immunity from state law. Specifically, the Court has shown in those decisions a concern about the possibility of state tax collectors coming onto reservations and seizing member owned property there. And this concern has implied a preference, also shown in those decisions, for enforcement mechanisms which operate outside the reservation and which focus upon the non-member supplier rather than the tribal retailer.

2. The New York system invalidated by the Court of Appeals is, ironically enough, exactly the sort of enforcement system explicitly preferred by this Court. It is directed to the supplier, and largely to what the supplier does outside the reservation. By invalidating that system, the Court of Appeals completely upsets the balance this Court has been attempting to strike. It upsets the balance by attributing to Congress an intent, which it finds in the Indian trader statutes, 25 U.S.C. §§ 261-264, to prohibit states from utilizing just those types of enforcement mechanisms which best accommodate the tribal interest by minimizing interference from state law. Such a result would be unfortunate, for it would force the states—and ultimately this Court—to consider the more intrusive enforcement mechanisms which the states have sought to avoid.

3. Such a result is also legally unsupportable, as an examination of the Indian trader statutes and proper preemption principles will show. The preemption analysis by the Court of Appeals was wooden and mechanical. Seizing upon

statements by this Court in other contexts that the federal regulatory system under the Indian trader statutes should be regarded as "comprehensive," the court uncritically applied what it felt to be the controlling principle to hold that any and all burdens imposed by the state on the supplier were automatically preempted by federal law.

The court overlooked, however, two fundamental points. First, under proper preemption analysis, the tribal interests embodied in the relevant federal statutes must be identified, and then weighed in balance with the competing interests of the state. (*See e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980)). Second, the relevant statutes here, the Indian trader statutes, have been enacted to protect the interests of tribes and their members; any protection afforded the traders themselves derives from, and is purely ancillary to, the protection afforded those tribal interests. (*See e.g.*, 25 U.S.C. § 262, authorizing the Commissioner of Indian Affairs to permit persons to trade with Indians "under such rules and regulations as [he] . . . may prescribe for the protection of said Indians.")

4. What, then, is the purpose and scope of that protection? The purpose is to protect Indian customers from economic exploitation. As applied by this Court in the context of state taxes upon the Indian traders themselves, the trader statutes prohibit a tax which could be passed on to Indian retail customers, *i.e.*, consumers, and which would thereby impair the comprehensive regulation of the retail price structure which Congress has provided for those Indian consumers. *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980). But neither the test of the trader statutes, nor their legislative history, nor the regulations promulgated under them, nor any court decisions dealing with them, evidence any similar concern for the Indian retailer as middleman, marketing a tax exemption to non-members.

The upshot is that essentially the same process of analysis and balancing of interests that the Court has already utilized in *Moe* and its progeny should also be the process used here. For that reason, the outcome should be the same as well.

Otherwise, the absurdities produced by the flawed and confused preemption analysis utilized by the Court of Appeals will persist. In *Moe* and its later cases, this Court has already authorized the states to require the Indian middleman to collect the taxes imposed on the non-member consumer. New York State has reduced even this burden on the middleman, by moving the collection obligation back one step in the distribution chain, from the middleman to the supplier. Yet the Court of Appeals, in its alternative holding, has determined that a burden found by this Court to be "minimal," and thus permissible when placed upon the Indian middleman, becomes "substantial" and thus impermissible when placed upon the non-Indian supplier. Proper preemption analysis produces no such absurdity.

ARGUMENT

STATE REGULATIONS, WHICH ARE DESIGNED TO INSURE COLLECTION OF TAXES FROM NON-TRIBAL MEMBERS AND REASONABLY ACCOMMODATE STATE AND TRIBAL INTERESTS, DO NOT IMPINGE UPON INTERESTS PROTECTED BY THE INDIAN TRADER STATUTES AND ARE NOT PREEMPTED THEREBY.

A. New York's Cigarette Tax System For Reservation Sales to Non-Members is Fully Consistent With The Regulatory Authority Allowed The States Under This Court's Decisions.

Prior decisions of this Court confirming the right of states to impose taxes on certain kinds of commercial transactions conducted on Indian reservations by non-members

have accorded the states the related right to take reasonable collection actions which do not unnecessarily intrude on core tribal interests. *Colville*, 447 U.S. at 162. The Court's prior holdings clearly sanction—if they did not expressly pass upon—the regulatory approach taken by New York as a balanced accommodation of state and tribal interests. Nevertheless, the Court of Appeals' characterization of New York's regulations on off-reservation cigarette suppliers (wholesalers or distributors) as significantly burdensome provides further reason for the Court to revisit once more the issue of permissible state regulatory activity which seeks to avoid widespread evasion of the tax obligation of non-member cigarette purchasers.[8]

The imposition of the tax collection obligation on the Indian reservation retailer by the state was upheld in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), against the charge of gross interference with the tribes' freedom from state regulation. *Id.* at 482. Subsequent cases focused upon the mechanisms that the state may properly use to enforce that collection obligation. Thus, *Colville*, the first of these cases, endorsed Washington's requirement that reservation smokeshop operators affix tax stamps to cigarette packages as evidence of payment of the tax prior to their sale to non-members. The obligation thus entailed prepayment of the tax to the state by the tribal retailer.[9] The Court affirmed in *Colville* the right of a state to impose "detailed" record-keeping requirements on the retailer to distinguish between nontaxable sales to Indians

[8]The decision below first holds that the Indian trader statutes foreclose any regulation of suppliers. Pet.App. 7. However, as an anchor to windward, the Court of Appeals proceeds to find New York's regulations infirm because of their significantly burdensome nature. Pet.App. 11.

[9]While not specifically addressed by the Court in *Moe*, Montana's law, in fact, required prepayment of the tax by the retailer to its distributor, who then remitted the tax to the state. *See Confederated Salish & Kootenai Tribes, Mont. v. Moe*, 392 F. Supp. 1297, 1308 (D. Mont. 1975).

and taxable transactions with non-members. 447 U.S. at 160. Off-reservation cigarette seizures by the state were approved by the Court as an adjunct to the on-reservation compliance program. *Colville*, 447 U.S. at 161-62.

The Court has more recently returned to the issue of the appropriate enforcement mechanisms. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court identified enforcement options available to the states when it reaffirmed their right to look to the tribes and their officials for assistance in the collection of taxes. Recourse to damage actions against tribal officers or agents and to assessments against cigarette suppliers are highlighted and approved in the decision. *Id.* at 514.

It should be noted that in none of these decisions did the Court have occasion to consider the ability of the states to apply on the reservation the whole range of enforcement measures that would logically attend the collection and record-keeping requirements for reservation operators approved in *Moe* and *Colville*. These additional compliance activities, which are an integral part of any state's off-reservation tax collection program, include registration, periodic or special audits of taxpayer records, filing of returns and other information, subpoenas and their enforcement for the production of records when necessary, and collection through levies or seizures of taxpayer assets.[10]

In the aftermath of *Moe*, *Colville*, and *Potawatomi* and in the absence of instruction from the Court about the full scope of enforcement alternatives, states like New York which sought to actively address contraband cigarette traffic in Indian country consciously considered and chose between two primary compliance policies. The first would incorporate measures directly related to the approved right

[10]In *Colville* the Court expressly reserved the question of a state's right to conduct on-reservation seizures of cigarettes to enforce the tax obligations. 447 U.S. at 162.

of a state to look to Indian retailers for tax collection and record-keeping. A continuing audit and supplemental collection process, contemplated by this option, is direct, traditional, and provides administrative efficiencies. The policy would also mean a pronounced state presence in Indian country. Its implementation might spawn extended litigation and serve to exacerbate problems in the state-tribal relationship.

The second alternative, supported by *Moe*, *Colville*, and *Potawatomi*, emphasizes off-reservation compliance measures and activities, imposing only acceptable burdens on reservation retailers consistent with this Court's decisions. As a policy choice for a state, the merits and demerits of this alternative are the mirror image of the first option. Advantages lie in lowering state-tribal tensions and reducing litigation over state regulatory prerogatives. Conversely, an off-reservation enforcement emphasis, marrying innovative and traditional compliance mechanisms, would likely lead to inefficiencies and leakage in untaxed sales in the face of committed contraband activities on the reservation.[11]

New York has obviously elected the second regulatory alternative. The validity of the features of its program is an issue of intense interest to the *amici* states which must similarly police against deliberate evasion of its taxes not only in the area of cigarette transactions but in respect to other consumer sales, notably motor vehicle fuel purchases.

The underlying objectives of New York's off-reservation enforcement emphasis are to maximize taxation of cigarettes destined for resale to non-members while ensuring fully an available supply of the untaxed tobacco product for tribal member consumption. The requirement of prepayment of a tax from licensed wholesalers or distributors of products such as cigarettes or motor vehicle fuel has been a traditional, nondiscriminatory collection mechanism utilized by states through the years. Payment of the tax by such persons, because of a statutory prepayment obligation upon suppliers, was an integral part of the Montana and Washington tax systems approved for application to reservation transactions in *Moe* and *Colville*.[12]

The prepayment requirement imposed on the off-reservation supplier, of course, moves the payment of the tax one step back in the chain of distribution, *i.e.,* away from the reservation seller upon whom the obligation to affix stamps and prepay the tax was authorized in *Moe* and *Colville*. In this respect, the burden on the reservation retailer is actually lessened.

The other central feature in New York's regulatory system is the provision which monitors the legitimate traffic of unstamped, *i.e.,* untaxed, cigarettes to the reservations for sale to tribal members. Sufficient quantities are ensured by a flexible set of rules which liberally allow for an aggregate amount that is the product of tribal membership and statistical per capita consumption, with leave given to sellers to demonstrate a larger market for tribal member consump-

[11]A greater state presence on the reservation, represented by the first enforcement option, would tend to lessen the incidence of contraband activity. Conservatively estimated, the state of Washington, whose compliance system parallels New York's, loses $8.9 million in tax revenues annually from such activity. REPORT OF THE LEGISLATIVE BUDGET COMMITTEE TO THE WASHINGTON LEGISLATURE, CIGARETTE TAX STUDY 1, 4 (1990).

[12]Where unstamped cigarettes may permissibly be transported or possessed within the state, as, for example, when a reservation merchant might choose to transact business with an out-of-state supplier, state law will likely require record-keeping and other arrangements for payment of the tax. See Pet.App. A11. *See also, e.g.,* Wash. Rev. Code § 82.24.250. Off-reservation seizures pursuant to applicable state law will occur when persons in possession of unstamped cigarettes choose not to comply with these requirements or when there is evidence of "wholesale evasion" of the state tax. *See Colville,* 447 U.S. at 162.

tain exemption certificates from their wholesale or retail customers on the reservations and to maintain accurate records of such transactions are rational adjuncts to the basic mechanism that insures the legitimate movement to the reservations of cigarettes which should properly be sold untaxed.[13] The traffic is regulated in a manner which does not intrude upon core tribal interests.

In summary, New York's law, which seeks to minimize the loss of taxes attributable to reservation cigarette sales to non-member purchasers by accommodating the relevant reservation interest of tribal sovereignty and the state's own concerns by an emphasis on off-reservation compliance. While New York's regulations represent a variation on the tax enforcement systems directly considered in *Moe* and *Colville*, their features fall clearly within the minimum burden limitations outlined by the Court, insofar as reservation interests are affected.[14]

However, the Court of Appeals concludes, rather paradoxically, that the requirements imposed on off-reservation persons, however they might lessen the burden on reservation sellers which are otherwise permissible under this Court's decisions, are preempted by federal law. We turn now to this contention.

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[13]This type of obligation is neither onerous nor unfamiliar. Under federal law cigarette distributors must file periodic returns with the states, reporting untaxed cigarettes sold and delivered into another jurisdiction. *See* 15 U.S.C. § 376.

[14]New York's rules also allow for the tribes to grant or withhold approval for the quantities of untaxed cigarettes that a supplier seeks to distribute to qualified sellers. Pet.App. 13. It should be further noted that the thrust of the State's regulations applied to off-reservation suppliers would have the propensity for reducing the need for detailed record-keeping by Indian retailers, the minimum burden contemplated by *Moe* and *Colville*.

B. Neither the Off-Reservation Nor On-Reservation Provisions of New York's Law Touch Upon the Interests that are the Concern of the Indian Trader Statutes (25 U.S.C. §§ 261-264) so as to Warrant Their Preemption by Federal Law.

There is much in the trilogy of *Moe*, *Colville*, and *Potawatomi* to support the conclusion that the Court has already held that regulatory schemes, like those of New York, are not preempted by the Indian trader statutes. 25 U.S.C. §§ 261-264.

The Court of Appeals acknowledges the existence of that support in its alternative holding which seeks to distinguish this Court's earlier decisions. Thus, New York's regulations are found to place "significant" burdens on off-reservation suppliers as Indian traders, whereas the regulatory systems earlier in issue before this Court presumably did not.[15] The opinion of the Court of Appeals is devoid of any discussion regarding the comparison of these obligations on suppliers with the *minimum* burdens on Indian retailers approved by this Court. Pet.App. A11-12.

In its opinion the Court of Appeals observes that "*Moe* and *Colville* involved burdens placed on Indian retailers dealing with non-Indians, rather than on wholesalers dealing with Indians, a significant difference . . ." Pet.App. A8. The court appears unaware that the Indian retailers in *Colville*, subject to state regulation, were themselves licensed Indian dealers. *See Confederated Tribes of Colville v. State of Wash.*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978).

Similarly, Montana's regulations at issue in *Moe* required suppliers to prepay the cigarette excise tax. *See supra n.9.* Most important perhaps is the Court's approval, first in *Colville* and more recently in *Potawatomi*, of off-res-

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[15]The position taken by the New York court, previously expressed in its earlier decisions, holds that the Indian trader statutes do not allow regulation of traders for any purpose. Pet.App. A7.

ervation seizures of suppliers' cigarette shipments. Those suppliers would be regarded as Indian traders for purposes of the federal statute under this Court's decision in *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). The regulatory impact of seizure transcends in significance any of the other burdens which New York has placed on suppliers and which the Court of Appeals considered as fatal under the federal statute. For whatever reason, the decision below fails to note any of these considerations.

There is thus ample evidence that the Court, by clear implication if not expressly, has already permitted the operation of state law directly upon Indian traders, notwithstanding the broad preemptive language employed by the Court in another context in *Warren Trading Post*, 380 U.S. 685.[16] The position is sound and is additionally supported by underlying considerations which inhere in the Indian trader statutes themselves.

Each of the cases in which this and other courts have found preemption of state tax laws because of the Indian trader statutes presents a situation where the economic burden of the tax imposed on the Indian trader was passed on to the tribal member. *Warren Trading Post*, 380 U.S. 685; *Central Machinery*, 448 U.S. 160; *New Mexico Taxation & Revenue Dep't v. Laguna Indus., Inc.*, 855 P.2d 127 (N.M. 1993).[17] By increasing the cost of the goods and services

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[16]The fact patterns underlying the decisions in *Moe* and *Colville* thus justify and explain the earlier remand of the instant case for reconsideration.

[17]The holding of the state court in the last of these decisions, applying the statutes to the provision of services, represents a questionable extension of the law, given the plain language of 25 U.S.C. § 261 which provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of *goods* and the prices at which such *goods* shall be sold to the Indians. (Emphasis added).

sold to the Indians, these state tax provisions were inconsistent with the provisions of the Indian trader statutes preserving to the Commissioner of Indian Affairs the power to set the price of goods sold to Indians. The vice of these state laws, however, was the burden imposed on the Indians, not the burden imposed on the Indian trader.

The New York tax regulations at issue herein are carefully tailored to avoid imposing any tax burden on tribal members. The only passed-on economic burden of the tax is that which is borne by the non-members retail purchaser. This Court in *Moe*, *Colville*, and *Potawatomi* has already authorized state tax systems that require the Indian retailer to collect tax from the non-member purchaser.

In short, the core concern of the federal law is the protection of the ultimate tribal member customer (as the trader's purchasers or sellers) on the reservation from "fraud and imposition." *Central Machinery*, 448 U.S. at 163. Must the federal law, however, be considered to foreclose the operation of state law upon transactions of the nature now under review when the ultimate purchasers are non-members and the tribal presence is represented by a retailing intermediary? The Court has, of course, impliedly rejected this notion in *Colville*, 447 U.S. at 155-56 ("The Indian trader statutes . . . incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange . . ., but no similar intent is evident with respect to sales by Indians to non-members of the Tribe.") (Citations omitted).

Absent some persuasive identification of a tribal interest that is at risk through New York's regulations, it would be anomalous to conclude that a state's right to protect itself against a reservation-marketed tax exemption (*Colville*, 447 U.S. at 155) is nonetheless circumscribed by concepts of reservation immunity whether expressed as a function of

tribal sovereignty or general federal preemption.[18] The latter principle is not to be applied uncritically as the Court has only recently admonished. *Cotton Petroleum*, 490 U.S. at 176 ("We have applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal and tribal interest.")

Relevant to a flexible preemption analysis is the historical fact that the present Indian trader statutes had their origins in the beginning of the nation and their precursors were conceived for a period when reservations were to be treated as isolated and separated from the states within whose boundaries they might be found.[19] Ingress and control over commercial relations within the reservation were to be the province of the federal government to insure against the exploitation of the reservation residents. The

[18]The Court of Appeals merely speculates that New York's regulations might disrupt Congress' statutory plan to prohibit unfair or unreasonable prices. Pet.App. A12. The opinion points to the cigarette tax prepayment by the Indian trader supplier as the kind of disruptive financial burden the federal statute was intended to protect against.

[19]The earliest Indian trader licensing laws enacted by Congress are chronicled in *Central Machinery*, 448 U.S. at 160. The language found in the principal provision of current law (25 U.S.C. § 261) which assigns to the Commissioner of Indian Affairs authority over "appointment" of traders and for the regulation of goods and their prices was first contained in the Act of August 15, 1876, 19 Stat. 200.

Indians' sale of goods indigenous to the reservation or its way of life were also the focus of the trading statutes.[20]

The present day reality reflects the non-member's increased access to the reservation, at times at the invitation of its tribal residents and, as this Court's cigarette tax case decisions from *Moe* to the instant case amply document, with the enticement of avoiding a tax obligation that would be otherwise owing. The concept of a congressional intent to establish reservations as tax havens for non-members cannot be gleaned from the trading statutes either in their evolution or their present day context.

The Indian trader statutes, in general language, direct the federal government to authorize trade with reservation Indians only under such rules and regulations as may be prescribed "for the protection of [reservation] Indians." 25 U.S.C. § 262. If there were some immunity to be derived by the Indian trader which acts as a supplier to tribal retailers who, in turn, sell to non-members, one might expect to find some suggestion of this tribal interest in the regulations adopted under the statute. 25 C.F.R. part 140. There is not a hint of such a concern in the generally stated rules or other indication that the thrust of the regulatory requirements is other than the historical focus, that of protecting the

[20]Of particular interest is an earlier provision in the Indian trader statutes, first enacted in 1834 and repealed in 1953, which was directed at activities of non-tribal purchasers on the reservation and provided:

> Every person, other than an Indian, who, within the Indian country, purchases or receives of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any article of clothing, except skins or furs, shall be liable to a penalty of fifty dollars.

R.S. § 2135. Beyond the fact of its absence from current law, this prior prohibitory provision was in no way directed at products imported into Indian country for resale to non-Indians—with the exception of the improvident sale of specified items for the Indians' subsistence.

Indian with whom the licensed trader is ultimately dealing.[21] Acknowledging the opening of the reservations for commercial dealings with non-members and the implication of state interests because of those dealings, the modern decisions reject the assertion that state regulation is perforce precluded on the reservation or preempted where there is a federal statute in place particularly addressing Indian concerns.[22] The particularized examination of federal, state, and tribal interests which the Court (*e.g.*, *Cotton Petroleum*, 490 U.S. at 176-77) holds must attend the issue of preemption leads inevitably to the conclusion that state tax regulation of transactions of non-members on the reservation is not foreclosed.

What remains to be considered is the alternative holding of the Court of Appeals that the regulations adopted by New York are preempted because they represent a *substantial* burden on the Indian trader *suppliers*. Pet.App. A11. Central to the court's construct is its shift of this Court's inquiry in *Moe* and *Colville* into the nature of this burden on tribal retailers to an analysis of the obligation placed upon suppliers.

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[21]The vigilance of the Bureau of Indian Affairs in adopting rules to carry out this mandate or even in enforcing existing regulations has been brought into question in the past. *See Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) (Language in Indian trader statutes authorizing Commissioner of Indian Affairs to adopt regulations "as he may deem just and proper" does not immunize from judicial review failure to adopt and enforce rules on the Navajo Reservation). *See also, U.S. ex rel. Keith v. Sioux Nation Shopping Center*, 488 F. Supp. 496 (D. S.D. 1980), *aff'd*, 634 F.2d 401 (8th Cir. 1980) (Non-Indian deemed to be in substantial compliance with Indian trader statutes by obtaining tribal permit where licenses were "almost" impossible to obtain from federal agency).

[22]*Cf. United States v. McGowan*, 302 U.S. 535, 539 (1938) ("enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation] of such state laws as conflict with the federal enactments.")

In the progression from *Moe* through *Colville* this Court found plainly acceptable a tax collection requirement (and accompanying prepayment obligation) on tribal retailers. The same approbation was given to the "detailed" record-keeping requirement for retailers to delineate taxable and non-taxable sales. *Colville*, 447 U.S. at 159-60. As we have earlier demonstrated, New York's regulations shift the prepayment obligation to the supplier; record-keeping obligations on the suppliers have the same objective of distinguishing between taxed and untaxed transactions.

The opinion of the Court of Appeals fails altogether to explain how this transfer of obligation from tribal retailers to the respondent suppliers necessitates invalidating the New York approach.[23] It is protection of tribal members, not non-members, from exploitation which is the concern of the Indian trader statutes. If there is no transgression upon that concern in the setting of *Moe* and *Colville*, there should be none in the present context either. It would indeed be anomalous to restrain the state authority to a greater degree when a non-tribal, non-reservation entity bears the challenged regulatory burden than when a tribal, reservation-based person does. For these reasons, the position of the Court of Appeals is unsupportable even when its own test is applied.

The ramifications of the decision of the Court of Appeals are extremely serious for the states. They have been earlier identified. Increased incidence of contraband activity and tax evasion on the reservation in the future is a cer-

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[23]The opinion reads too narrowly the decision in *Potawatomi*, which sanctions the right of states to assess suppliers for the cigarette tax, by concluding that assessments can be made only *after* the sale of unstamped cigarettes to tribal retailers. Even if this constricted reading is followed, a supplier would be no less likely to take its ultimate obligation for payment of the tax into its calculation of the price to be charged to the retailer. Pet.App. A10-11. The financial burden of the tax, which the Court of Appeals found unacceptable, would remain.

tainty as the principle of the decision below is extended to marketable commodities other than cigarettes and the states are denied the right to regulate the Indian trader when sales are made to non-members. Increased surveillance and compliance efforts are similarly inevitable, occasioning expenditures which should be unnecessary.[24] Further litigation can be predicted as the states pursue other allowable enforcement options on the reservation.

There is one final consideration, appropriate for mention. Consistent with the Court's suggestion in *Potawatomi*, a number of states and tribes have sought, with some success, to negotiate compacts for the collection and distribution of cigarette taxes. It may fairly be inferred that these agreements were reached as the parties evaluated what is the law under *Moe* and later decisions of this Court. Other negotiations in the area of cigarette taxes and motor vehicle fuel are continuing. This case, therefore, presents the opportunity for the Court to impart certainty and accuracy on an important issue of regulatory jurisdiction, thus allowing tribes and states alike to assess rights and responsibilities to be brought to their continuing relationship.

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[24]Prohibitions on state regulations which require suppliers to prepay the tax and maintain records of exempt and taxable sales would particularly aggravate the enforcement problem in the case of motor vehicle fuel sales. Unlike the situation with cigarettes which can be made to bear a tax stamp, there is no equivalent identifier for motor vehicle fuel. Thus, detecting the extent of contraband activity for this product would be rendered extremely difficult, if not impossible.

CONCLUSION

The judgment of the Court of Appeals for the State of New York should be reversed.

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December 15, 1993

In The

Supreme Court of the United States

October Term, 1993

Department of Taxation and Finance of the State of New York, *et al.*,

Petitioners,

v.

Milhelm Attea & Bros., Inc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF SENECA NATION OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF SENECA NATION OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS *

The Seneca Nation of Indians is a federally recognized sovereign Indian Nation located within New York State. It is one of the Six Nations that comprise the Iroquois Confederacy. The tax scheme under consideration in this case imposes a quota on the number of cigarettes available for sale to all Indians located in New York State and subjects the Nations and Indian retailers to State licensing and regulation. The Seneca Nation urges that this system imposes substantial burdens inconsistent with the sovereign status of Indians and controlling federal law.

Moreover, the Seneca Nation believes that promises made to it in treaties with the federal government, which are incorporated into federal law, prohibit the State from this assertion of regulatory jurisdiction. Unlike other Indian tribes which this Court has recognized are properly subject to some, although limited, state authority, the Seneca Nation was never conquered nor removed from its land. In its treaties with the United States it has never ceded its jurisdiction nor its authority over the lands it now occupies.

INTRODUCTION AND SUMMARY OF ARGUMENT

By regulation, and in order to assist in the collection of state taxes on reservation sales to non-Indian customers, New York has imposed a quota on the number of tax-free cigarettes that may be supplied to Indian retailers for resale to Indians on their own reservation. This quota system is invalid for two reasons. First, the regulations violate longstanding principles of Indian sovereignty. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). The regulations are also preempted by the federal

* The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

Indian trader statutes, which reserve to the Commissioner of Indian Affairs the "sole power and authority" to "specify[] the kind and quantity of goods" to be sold to the Indians and "to appoint traders to the Indian tribes[.]" 25 U.S.C. §§ 261-264 (1988). By regulating the "kind" and "quantity" of cigarettes sold to Indian customers, the State imposes, as the court below recognized, a "significant" burden on Indians. 599 N.Y.S. 2d 510, 514 (N.Y. 1993).

Second, the tax itself is invalid as applied to all reservation sales because of special treaties and statutory provisions applicable to the Seneca Nation and the other members of the Iroquois Confederacy. The Seneca Nation entered into unique treaties that explicitly acknowledged their sovereignty and their freedom from state taxation. Thus, although this Court has approved the imposition of certain taxes on sales by Indians to non-Indians, *see, e.g., Colville,* 447 U.S. at 159, those precedents are inapposite here.

ARGUMENT

I. THE NEW YORK REGULATIONS ARE INVALID BECAUSE THEY RESTRICT THE "KIND" AND "QUANTITY" OF CIGARETTES DESTINED FOR INDIAN CONSUMPTION

A. The Federal Indian Trader Statutes, The Indian Commerce Clause, And Federal Policy Are Broadly Preemptive Of State Efforts To Regulate Indian Affairs

The State urges that, unless barred by the special treaties and statutory provisions applicable to the Six Nations of the Iroquois Confederacy,[1] *see* Part II *infra,* it has the power to compel non-Indian wholesalers to collect a tax from Indian retailers on cigarettes destined for

[1] The Confederacy includes the following six federally recognized Nations: Seneca, Mohawk, Onondaga, Oneida, Cayuga, and Tuscarora.

sale to non-Indians.[2] Respondents in this case urge that the federal Indian trader statutes broadly preempt the New York regulations. Amicus Curiae the Seneca Nation agrees, but for reasons distinct from those urged by Respondents.

The Seneca Nation maintains that the regulations in question do far more than regulate sales to non-Indian customers, as is apparent from their face, and as Petitioners themselves concede. Pet'rs Br. at 13. As an integral part of its regulatory scheme, the State restricts sales destined for Indian consumption. The Seneca Nation believes that the states have no possible interest or jurisdiction to restrict sales by non-Indian wholesalers to Indian tribes or Indian retailers when the goods involved are destined for sale to Indian customers. The regulations in question restrict such sales to Indian consumers in violation of the Indian trader statutes, the Indian Commerce Clause, and longstanding federal policy favoring Indian self-government in Indian country.

The Court has long recognized that tribal sovereignty sharply limits state jurisdiction where Indians are concerned. Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson,* 324 U.S. 786, 789 (1945) (quoted in *McClanahan v. Arizona State Tax Comm'n* 411 U.S. 164, 172-73 (1973)). For this reason, "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply." *McClanahan,* 411 U.S. at 170-71; (internal quotation omitted); *see also Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 687 n.3 (1965) (noting that state laws apply only where specifically authorized or where "they clearly do not interfere with federal policies concerning the reservations").

[2] This cigarette tax of 56 cents per pack, 1993 N.Y. Laws, Ch. 57, § 53, is in addition to the New York state sales tax of 4%, and any county or local sales tax of up to 4% that may be imposed on top of the state sales tax. N.Y. Tax Law §§ 1105 & 1201 (Mc-

Federal law also restricts state authority. There are "two 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law or it may interfere with the tribe's ability to exercise its sovereign functions." *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982). These twin barriers together form a species of preemption in which the usual presumption—that a state law is not preempted—is reversed. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989). Where Indian tribes are concerned, the rule is that state laws are preempted, in the absence of clear federal approval. *McClanahan*, 411 U.S. at 170-71.[3]

These restrictions apply in the area of state taxation. As this Court stated just last Term, "[a]bsent explicit congressional direction to the contrary, we presume against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1993 (1993).[4] Thus,

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Kinney 1987 & Supp. 1993). The sales tax is not subject to the precollection mechanism and is not involved in this case.

[3] The Court has consistently applied this federal policy to prevent state regulation of Indian affairs in Indian country. *E.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states"); *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976); *McClanahan*, 411 U.S. at 172 (federal policy of advancing Indian sovereignty serves as a "backdrop" against which preemption analysis is informed); Felix S. Cohen, *Handbook of Federal Indian Law* 273 (1982) ("For this reason broad preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty").

[4] *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or

"[a]lthough exemptions from tax laws should, as a general rule, be clearly expressed, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members working and living on land set aside for those members." *Id.* at 1991 (internal quotation and citation omitted).

The state tax immunity of Indians is well established. States are precluded from imposing taxes on Indians and their activities on the reservation. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). *See also* Felix S. Cohen, *Handbook of Federal Indian Law* 259-70 & n.1 (1982) ("Cohen (1982)"). For example, the Court's modern cases establish beyond question that a state generally may not impose taxes on the income, *McClanahan*, 411 U.S. at 165, 181, or the real property, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), or the personal property, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 163 (1980), of Tribes or tribal members.

This general rule favoring Indian sovereignty applies with particular force in cases, such as this one, involving the sale of goods by non-Indians for Indian consumption, for this trade is subject to comprehensive federal regulation designed specifically to protect Indians. *Warren Trading Post*, 380 U.S. at 691. In the Indian trader statutes, 25 U.S.C. §§ 261-264 (1988), Congress vested in the Federal Commissioner of Indian Affairs "sole power and authority" for regulating all aspects of trade with Indians, including "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[5]

Indian income from activities carried on within the boundaries of the reservation").

[5] 25 U.S.C. § 261 provides in full:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and

In addition, Congress has vested in the Commissioner exclusive authority "to appoint traders." *Id.* Once the Commissioner has determined that a person may "engage in such trade," the Commissioner is left to prescribe "the rules and regulations, if any, under which such trading may take place." 25 U.S.C. § 262.[6] The Commissioner, as regulations enacted under the statute make clear, is authorized to exclude anyone from trading with the Indians and to prescribe the kinds of items that may be sold to Indians and the terms on which they may be sold. 25 C.F.R. §§ 140.1-140.26 (1993). Indeed, the more than 100 currently valid licenses on file in the Syracuse, New York Area Office of the Bureau of Indian Affairs are quite detailed and limit the licensee to trading in particular products.

This comprehensive statutory scheme authorizing regulation of the "kind" and "quantity" of goods "sold to the Indians" was passed in 1876 and traces back directly to earlier comprehensive enactments. *Warren Trading Post*, 380 U.S. at 689. In *Warren Trading Post*, Justice Black noted that the extensive federal control of trade destined for Indian consumption began with a federal statute "passed in 1790 by the first Congress 'to regulate trade and intercourse with the Indian tribes,'" which required federal licenses for Indian traders and specified "in detail the conditions on which such licenses would be granted." *Id.* at 688-89. Justice Black acknowledged that the "comprehensive federal regulation has continued from that day to this." *Id.*

More recently, the Court has noted that "[t]he Indian trader statutes . . . incorporate a congressional desire

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proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

[6] 25 U.S.C. § 262 provides in full:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange." *Colville*, 447 U.S. at 155. In order to achieve its goal of protecting Indian consumers, Congress intended to permit "no burden [to] be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren Trading Post*, 380 U.S. at 691.

That the preemptive force of the Indian trader statutes is particularly potent where sales for Indian consumption are involved is plainly demonstrated by prior decisions of this Court. At issue in *Warren Trading Post*, for example, was a two percent gross receipts tax levied on a federally licensed Indian trader selling to Indians on the Navajo Indian Reservation. 380 U.S. at 685-86. The Court invalidated the tax, noting that it might have disturbed "the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 691. A tax on income derived from sales to reservation Indians, notwithstanding its incidental impact on Indian consumers, could not be regarded as specifically authorized by Acts of Congress, nor as "clearly . . . not interfer[ing] with federal policies concerning the reservations." *Id.* at 686-87 & n.3. In all events, as the Court concluded, "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations *so fully in hand that no room remains for state laws imposing additional burdens upon traders.*" *Id.* at 690 (emphasis added).

The preemptive force of the Indian trader statutes is so strong that this Court has held that Arizona cannot impose a tax on the sale of farm machinery to an Indian, even where the seller is not licensed as an Indian trader. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). "It is the existence of the Indian trader statutes," wrote the Court, "and not their administration, that pre-empts the field of transac-

tions with Indians occurring on Indian reservations." *Id.* at 165.

In short, nothing in the Indian trader statutes authorizes New York to restrict sales from off-reservation wholesalers destined for Indian consumption. To the contrary, the Court's cases construing the statutes and related administrative regulations confirm that the federal government exercises plenary control over the "kind," "quantity" and "price" of goods destined for Indian consumption. Congress has not allowed for the application of state laws that would subject tribal Indians to comprehensive state control in these areas.

B. The New York Regulations Restrict And Substantially Burden Sales For Indian Consumption

It is against these preemptive statutes and "the 'backdrop' of Indian sovereignty" that the New York scheme of taxing cigarette sales on Indian reservations, and the burdens that scheme imposes, must be assessed. *Moe v. Confederated Salish and Kootenai of the Flathead Reservation*, 425 U.S. 463, 475-76 (1976). Tellingly, Petitioners acknowledge that "the focus and principal burden" of compliance with its comprehensive "regulatory scheme lies with and falls upon the Indian nation or tribe and the reservation retailer" (Pet'rs Br. at 13), a burden the court below aptly described as *"significant."* 599 N.Y.S.2d at 514 (emphasis in original).

Unlike taxes permitted by this Court in *Moe* and its progeny, *see infra* at 13-18, the New York scheme does not involve the "simple expedient" of a mechanism for collecting the cigarette tax from non-Indian consumers. Rather, it requires extensive state involvement and control in the form of licensing and approval before cigarettes may be purchased for resale to Indians. More significantly, the New York scheme directly imposes a quota on the number of cigarettes that may be sold for Indian consumption.

The New York tax operates as follows. As to cigarettes upon which the retailers have prepaid the tax and

which therefore bear state tax stamps, Indian retailers may purchase an unlimited amount. These "stamped" cigarettes are destined for sale on the reservation to non-Indians. With respect to untaxed cigarettes, which bear no tax stamps, that is, those destined for sale to Indians, New York limits the amount that may be purchased. That amount is determined under a formula prescribed by regulation. The formula, intended to reflect "probable demand," may be derived from evidence a Tribe may submit,[7] or by the State calculating "such demand based upon the New York average consumption per capita . . . multiplied by the number of enrolled members of the affected nation or tribe (or . . . by the reservation service area population . . .)." 20 N.Y.C.R.R. § 335.7(d)(2)(ii). These cigarettes may be sold by the wholesaler only to a "registered dealer," that is, a dealer "registered" by the State, who must meet several State requirements. *Id.* § 335.6(f).

These regulations plainly interfere with the exclusive federal control in this area—as well as with Indian sovereignty—in three fundamental ways.

First, New York imposes additional requirements as well as a State approval process on federally-protected Indian retailers. Under the New York scheme, only those Indian Tribes and Indian retailers registered with and licensed by the State may receive unstamped cigarettes for resale to Indians on Indian reservations. 20 N.Y.C.R.R. § 335.6(b)(4), (f)(i)-(iii)(b)(2).[8] An Indian retailer may be denied a certificate of registration permitting sales to Indians for several reasons, including

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[7] This evidence may include "records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence." 20 N.Y.C.R.R. § 355.7(d)(2)(i).

[8] In order to avoid confusion, *Amicus* will join the parties in citing the regulations as numbered at the time this case was filed. *See* Pet'rs Br. at 3 n.3. The regulations are reproduced in the appendix to Petitioners' brief.

that the retailer has outstanding tax liability of any kind; that the retailer is not already licensed to collect state taxes (which requires payment of $1,500 and the posting of a $1,000 bond, 20 N.Y.C.R.R. § 331.1(5)(b)), or that the retailer does not submit evidence of compliance with applicable tribal regulations. *Id.* § 335.6(f)(iii)(a). Even if they meet the prescribed requirements, Indian retailers are not ensured of receiving a license under the regulations.[9]

Second, New York taxes sales to Indians of cigarettes that will be consumed off of the reservation. Under the regulations, Indians are excused from payment of tax on cigarettes purchased on the reservation only if the cigarettes are to be consumed on the reservation. 20 N.Y.C.R.R. § 335.6(e). Indeed, under New York law, possession of unstamped cigarettes off the reservation may give rise to stiff civil and criminal penalties. *See* N.Y. Tax Law § 1814(h) (McKinney Supp. 1993). But this conflicts directly with the right of individual Indian consumers to purchase cigarettes free from state tax. *See Moe*, 425 U.S. at 480-81 (invalidating personal property tax); *Colville*, 447 U.S. at 163 (striking down state excise taxes on motor vehicles used partly on and partly off the reservation).

Finally, and perhaps most offensive to the federal statutory scheme, is that New York has created a system under which it imposes a quota on the sale of cigarettes

[9] The regulations provide that "[u]pon application, the Department . . . *may* register an applicant and issue a certificate . . . if the applicant" satisfies the requirements. *Id.* § 335.6(f) (emphasis added). The dealer is also required to retain records of each purchase for three years. N.Y. Tax Law § 474(4) (McKinney 1987); 20 N.Y.C.R.R. § 335.5. Violation of these provisions exposes a dealer to sanctions ranging from loss of certificate of registration (N.Y. Tax Law § 480(1) (McKinney Supp. 1993)), to civil penalties (*e.g.*, N.Y. Tax Law §§ 480-a(3), 481(1)(a)(i), 481(1)(b)), to interest (*Id.* § 481(1)(a)(ii)), to criminal liability (*Id.* §481(4) (McKinney 1987 & Supp. 1993)). Finally, a delinquent dealer may forfeit any real property necessary to satisfy the tax liability. N.Y. Tax Law § 479 (McKinney 1987).

to Indian consumers on Indian reservations. 20 N.Y.C.R.R. § 335.7. Pursuant to this regulation, the Commissioner must determine the total number of cigarettes that may be sold on the reservation for consumption by Indians. *Id.* § 335.7(d). The Commissioner arrives at that number by multiplying the number of enrolled reservation Indians (or, if such membership numbers are not available, the reservation service area population) by the New York average per capita consumption of cigarettes. *Id.* In the alternative, the Tribe may provide the Commissioner with "evidence," *id.* § 335.7(d)(2)(i), from which the Commissioner establishes the quota.

But Congress has expressly declared that determinations as to the quantity of goods that may be sold to Indians in Indian country rest solely with the federal government. *See* 25 U.S.C. § 261. That explicit limitation on state authority is particularly compelling here. New York's quota system, like any system of rationing, would wreak havoc on the chain of distribution and create substantial burdens on Indian purchasers unless there is complete accuracy in the estimation of the number and the brand of cigarettes sought. There is no basis for assuming that New York has the ability accurately to guess overall Indian demand. The New York calculation looks to the number of "enrolled" Indians. There are some 6,400 enrolled Seneca Indians,[10] and we estimate that there are an additional 25,000 Indians enrolled in other Tribes throughout the State. These estimates may be low in view of the 1990 U.S. Census estimate that there are 60,855 Indians throughout New York State.[11]

[10] Official Role, Seneca Nation (1993).

[11] Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population, General Population Characteristics, New York*, Table 3 (1990 CP-1-34), at 45. Even that number probably seriously under-counts the actual Indian population, as Indians are reluctant to respond to census questionnaires. Barbara Vobejda, *More Americans Declaring Indian Identity; Shifting Self-Image Seen Behind 80-Year Tripling in Census Numbers*, THE WASHINGTON POST, Feb. 11, 1991, at A1.

The New York quota then requires a determination of cigarette consumption. Neither figures for the average consumption by members of the Six Nations nor for New York State generally are available. Americans consumed 2,576 cigarettes per person in 1993.[12] Whether that figure is representative of smokers in New York, or of smokers who are Indians, is unknown.

Even if the State could predict *aggregate* Indian cigarette consumption with any degree of accuracy, the realities of the marketplace make clear that this system is unsound in theory and unworkable in practice. Indian consumers will be restricted in obtaining the kind and quantity of the cigarette brands of their choosing because the market structure precludes the possibility of distribution in precise proportion to demand.

American cigarette smokers exhibit strong brand preferences, choosing from 59 brands, excluding generics (*i.e.*, non-brand), and several hundred "brand extensions."[13] New York's formula makes no accommodation for brand preferences, addressing only the number of cigarettes that may be distributed to retailers for tax-free purchase. Compounding the difficulty, cigarettes are sold in New York on 10 separate reservations, through some 100 retail smokeshops. Those 100 retailers do business with more than 75 cigarette wholesalers.[14] Because of intense price competition, the relationship between wholesalers and retailers is constantly changing. Indeed, at any given time a single retailer may be dealing with several wholesalers. The number of wholesalers and retailers, and the

[12] United States Dep't of Agriculture, *Tobacco Situation and Outlook Yearbook*, 5 (Sept. 1993).

[13] A "brand extension" is a variation of a brand offering; RJR Nabisco offers, for example, "Camel" cigarettes with and without filters. The Maxwell Consumer Report, *1991 Year-End Sales Estimates For The Cigarette Industry* (1993) (listing sales figures for each brand and brand extension).

[14] *See* Records of Bureau of Indian Affairs, Syracuse, N.Y. Area Office.

fluid relationships that exist among them, will inexorably lead to a burden on Indian purchasers.

As a result, Indians will inevitably encounter retailers who do not carry their brands at all or who have sold out their supply of tax-free cigarettes. Indians may thus be forced to pay the cigarette tax[15] or travel, perhaps a considerable distance, to another smokeshop that may have exempt cigarettes in the sought-after brands, or to forego the purchase altogether. Wholesalers and retailers alike, faced with extensive administrative requirements, may raise prices or simply refuse to carry cigarettes earmarked by the State for Indian consumption.

In sum, the New York regulatory scheme, as the court below correctly observed, places "significant" burdens on both Indian traders and Indians. Unlike the "simple collection requirements" considered in *Moe, Colville*, and *Potawatomi, infra*, at 13-18, this scheme impermissibly burdens and regulates trade destined for Indian consumption, imposes a quota on Indian purchases from Indian traders, and subjects Indian Tribes and Indian retailers to comprehensive, unauthorized state regulation. While New York may have some pecuniary interest in regulating Indian trade, notwithstanding the extensive federal involvement in the area, it has no legal interest at all in restricting sales for Indian consumption. "Until Congress repeals or amends the Indian trader statutes . . . [the Court] must give them 'a sweep as broad as their language.'" *Central Machinery*, 448 U.S. at 166 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

C. This Court's Decisions In *Moe, Colville* And *Potawatomi* Cannot Save The Regulations

Recent cases upholding state taxation of on-reservation cigarette sales by Indians to non-Indians, do not, contrary to Petitioners' assertion (Pet'rs Br. at 14-19), au-

[15] That some refund mechanism may be available. Aff. of William F. Collins, Record on App. at 146-47, is unavailing given its likely burdensome and cumbersome nature.

thorize states to restrict sales to Indians in aid of their efforts to collect a tax on cigarettes from non-Indians. Those cases arise against a backdrop of repeated decisions of this Court that caution against a broad reading of state authority on Indian reservations even where commercial transactions with non-Indians are involved. *See, e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Ramah Navajo Sch. Bd.,* 458 U.S. at 837. At most, this Court's cigarette cases acknowledge that those particular states may impose cigarette taxes on non-Indian retail customers, where doing so results in only a minimal collection burden on the part of Indian retailers.

For example, in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976), Montana sought to assess a license fee on a vendor selling cigarettes on the reservation, and to impose a tax on sales of cigarettes on the reservation to Indians and non-Indians alike. With respect to the sale of cigarettes by Indians to *non-Indians,* the Court held that the Indian retailer could be required, as "a simple expedient," to collect and remit the state's sales tax. *Id.* at 481-83.[17] The Court approved the collection requirement because it was no more than a "minimal burden" and was not "strictly speaking, a tax at all" to which the rule of presumed invalidity would apply. *Id.* at 483

[16] *Oklahoma Tax Comm'n v. Citizen Band Potamatomi Indian Tribe of Okla.,* 498 U.S. 505 (1991); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976).

[17] "We therefore agree . . . that to the extent that the 'smoke shops' sell to those upon whom the state has validly imposed a sales or excise tax with respect to the article sold, the State may reqire the Indian proprietor *simply to add the tax to the sales price* and thereby aid the State's collection . . . ." *Id.* at 483. Indian customers were largely unaffected because the incidence of the tax fell on only non-Indian customers. *Id.* at 481-82. The importance of this distinction has been underscored since. *E.g., California State Bd. of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 12 (1985) (per curiam).

(citing *Mescalero Apache Tribe v. Jones,* 411 U.S. at 148). The Court expressed no opinion, however, with respect to the "complicated problems of enforcement" stemming from the limited collection burden. *Id.* at 468 n.6. At the same time, the Court, relying on Indian sovereignty, held that Montana had no authority to exact a vendor license fee from a reservation Indian conducting a cigarette business for the Tribe on reservation land, or to impose a sales tax on the sale of cigarettes by Indians to Indians. *Id.* at 475-81.

The Court returned to the question of state taxation of retail sales of cigarettes to non-Indians in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980). When considering the " 'complicated problems' of enforcement that distinctions between exempt and nonexempt sales might entail," the Court noted that the statute's "simple collection burden" imposed no more than a minimal responsibility to "affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sales to nonmembers of the Tribe."[18] 447 U.S. at 159 (quotation omitted).[19] Washington required an Indian purchaser who was not already known to the retailer to present tribal identification and also required the retailer to record taxable and non-taxable transactions. These were not, on the record before the Court, considered an undue burden on Indian retailers. *Id.* at 160. The taxing mechanism did not operate to restrict sales destined for Indian consumption, and nothing in the Court's opinion could be read to authorize such regulation.

[18] The Court also considered and rejected an excise tax the State sought to impose on Indian vehicles operated on and off of the reservation. *Id.* at 163 ("While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accompish what *Moe* held was prohibited.").

[19] Unlike the present case, there was no requirement in *Colville* that the Indian retailers purchase only cigarettes already stamped and for which the tax had been pre-collected or cigarettes pre-approved by the State for sale to Indians. 447 U.S. at 141.

The Court's most recent decision in this area, *Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 506 (1991), reaffirms the primacy of tribal sovereignty. In that case, Oklahoma sought to enforce a tax on the sale of cigarettes to Indians and non-Indians and sought to obtain judgment against the Tribe for unpaid taxes. The Tribe claimed immunity from both the suit and the sales tax by virtue of tribal sovereignty. In upholding the Tribe's claim to immunity, the Court rejected Oklahoma's invitation to abandon the longstanding tribal sovereignty doctrine and the presumption of invalidity of state taxation on Indian lands. This rejection made particular sense in light of apparent congressional approval of the view of Indians as "domestic dependent nations" entitled to sovereign immunity. *Id.* at 509-10.

However, although a Tribe cannot be sued for non-collection, tribal sovereignty "does not excuse a tribe from all obligations to assist in the collection of validity imposed state sales taxes," so long as collection constitutes only "a minimal burden." 498 U.S. at 512. The Court noted that tribal sovereign immunity does not leave the State without any remedy in the event that Indians fail to collect taxes from their non-Indian customers:

> We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville* [447 U.S.] at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990).

498 U.S. at 514. Compliance with the collection requirement, as the Court noted, could be more efficiently assured through negotiation with the Tribes or by seeking "appropriate legislation from Congress." *Id.*

Petitioners here point to *Potawatomi*'s discussion of potential remedial measures and conclude that it, together with *Moe* and *Colville*, somehow authorizes any state regulation designed "to prevent avoidance of tax by non-Indian purchasers." Pet'rs Br. at 14. But *Potawatomi* neither implicitly overrules this Court's long and unbroken line of decisions concerning the extensive federal role in the regulation of Indian trading, nor does it create plenary state jurisdiction over Indian trade. Rather, it merely addressed the situation—not present here—in which past due taxes were owing, suggesting that collection from wholesalers might be appropriate and only in that instance.[20] It does not authorize comprehensive regulation of every purchase or sale of cigarettes on Indian reservations. This reading is not "fallacious" (Pet'rs Br. at 19) —it is the only reading consistent with the context of the case and this Court's longstanding Indian jurisprudence. In any event, *Potawatomi* does not authorize restrictions on Indian purchasers as a method of enforcing the collection obligation with respect to non-Indians.

A careful review of the *Moe*, *Colville* and *Potawatomi* opinions demonstrates that the *only* regulations of sales for Indian consumption that were sustained were the simple requirements, consistent with principles of comity among sovereigns, that Indians identify themselves at the

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[20] That *Potawatomi* concerns the limited situation of remedying past collection violations may be seen through the Court's agreement with the United States' brief in that case:

> However, there are measures available to the Commission to ensure collection of the tax in the future. . . . [I]f the Tribe continues to sell unstamped cigarettes, the Commission could assess the unpaid taxes against wholesalers that supply such cigarettes to the Tribe, as it has done before. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). . . . [T]he Commission could seize and forfeit unstamped cigarettes . . . enroute to the tribal store. *See Colville*, 447 U.S. at 161-162.

Br. of United States at 18-19 n.17, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 506 (1991) (No. 1322) (citations omitted).

point of purchase and that the retailer keep records of such sales. *Colville,* 447 U.S. at 160. In all other instances, this Court has invalidated State taxes that fall on or burden Indians, including statutes imposing taxes on Indian property and sales to Indians, and a license fee imposed upon retailers selling to Indian consumers. So too in other contexts this Court has invalidated state regulations directed solely to non-Indian activities where the burden of the regulation would impair or preclude Indian activities or Indian self-governance. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. at 338-41; *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987). Nothing in *Moe, Colville,* or *Potawatomi* authorizes the imposition of anything more than a minimal burden on Indian retailers selling cigarettes to non-Indians in those particular states. Nothing in those decisions supports New York's unparalleled assertion of state power to restrict the sale of goods of any kind to Indian consumers in Indian country.

II. BECAUSE OF THE SPECIAL STATUS OF THE SENECA NATION OF INDIANS AND THE OTHER FIVE NATIONS OF THE IROQUOIS CONFEDERACY, THE REGULATIONS ARE ALSO INVALID INSOFAR AS THEY SEEK TO TAX SALES ON RESERVATION LANDS

Petitioners in this case urge that their interest in taxing sales to non-Indians justifies their assumption of authority over and concomitant restrictions on Indian trade. The Seneca Nation maintains, however, that the plain language of treaties and federal statutes pertaining solely to it and the other member tribes of the Six Nations prohibit application of all New York taxes on activities occurring on reservation lands absent congressional approval. Therefore, the Six Nations, unlike other Indians, claim protection not only under the federal policy favoring tribal sovereignty applicable to Indians generally, but, more specifically, also under treaties that would have reasonably been understood by them as leaving no room for the application of state taxes.

In this case, amicus urged below that the treaties governing the relations between the Six Nations and the United States and implementing federal legislation preclude taxation of on-reservation sales (although the court did not reach the question). However, this point was not urged by the Respondents. To the contrary, they urged there, as they do here, that the solution for New York is to impose the tax on the Indian retailer, an approach we believe to be wholly improper and contrary to both the treaties and to 25 U.S.C. § 233 (1988).[21]

As we have discussed, this Court's decisions in *Moe, Colville,* and *Potawatomi,* recognized that the states of Montana, Washington and Oklahoma, consistent with the treaties and federal enactments controlling in those states, could validly impose a tax on the sale of cigarettes to non-Indians in Indian country. Looking carefully to the applicable treaties and federal statutes and "[r]eading them against the 'backdrop' of the Indian sovereignty doctrine," the Court concluded that with respect to those tribes the taxes did not frustrate their rights to self-governance, nor did they frustrate the federal statutory scheme. *E.g., Moe,* 425 U.S. at 475, 483 (quoting *McClanahan,* 411 U.S. at 172). However, the Tribes of the Six Nations, unlike their western counterparts, have never surrendered their sovereignty and have been specifically preserved in their sovereign status, exempt from state tax laws, by treaties and statutes applicable only to them.[22] Accordingly, the present regulations cannot

[21] Whether the regulations at issue here are authorized by New York law is an unresolved question currently pending before the New York Court of Appeals. *See Snyder v. Wetzler,* No. 67506 (N.Y. App. Div. Nov. 10, 1993).

[22] The Indian tribes at issue in *Moe, Colville,* and *Potawatomi* had surrendered their sovereignty and were wholly dependent on federal protection from state encroachment. The treaty considered in *Moe,* for example, provided that the "Flathead Nation[would] cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied by them." Treaty with the Flatheads, July 16, 1855, U.S.-Flathead Nation, 12 Stat. 975. The treaties considered in *Colville* all likewise ceded the re-

validly be applied to the Tribes of the Six Nations.[23]

A. New York State Cannot Impose Taxes On Reservation Activities Because The Six Nations Uniquely Retained Their Sovereign Status

Since the early days of the Republic, this Court has viewed Indian tribes as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Most tribes maintain this sovereign status as a matter of federal policy in the present day. *See Potawatomi*, 498 U.S. at 510. However, because most Indians "through conquest or treaty were induced to give up complete independence" on their lands in exchange for federal protection, *Williams v. Lee*, 358 U.S. 217, 218 (1959), this Court concluded that those lands are not automatically exempt from operation of all state laws. *See Potawatomi*, 498 U.S. at 512. However, unlike the Potawatomis and most other Indians, the Senecas were never removed or relocated, and the lands they occupy are aboriginal. Nor did they surrender by treaty their sovereign status. As a result, activities occurring on Seneca lands remain exempt from operation of state regulatory law.

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spective Tribes' rights in exchange for federal protection. Treaty of Point Elliot, Jan. 22, 1855, U.S.-Dwamish and Suquamish Indians, 12 Stat. 927; Treaty with the Makah Tribe, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, June 9, 1855, U.S.-Yakama Nation, 12 Stat. 951. The land at issue in *Potawatomi* was conveyed by a quit claim deed providing that "these tracts are not exempt from taxation . . . because of Indian ownership." Act of Sept. 13, 1960, Pub. L. 86-761, 74 Stat. 903. The Indians in these tribes nonetheless retained some sovereignty by virtue of federal policy and statutes addressing Indians in general.

[23] This would not preclude New York from imposing a use tax on the off-reservation consumption of cigarettes by non-Indians.

1. *The Six Nations Were Never Conquered And Therefore Did Not Relinquish Their Sovereign Status*

Owing to their relatively early contact with European settlers, the Six Nations became important allies for the competing European governments who laid claims to various parts of what is now the Northeastern United States and Canada. During the American Revolution, a majority of the Tribes of the Six Nations actively waged war in support of the British Crown. Felix S. Cohen, *Handbook of Federal Indian Law* 418 (1972) ("Cohen (1972)"). Even after the 1781 defeat of British forces at Yorktown, Great Britain was still unlawfully in possession of several forts in New York. From that position, the British provoked the Six Nations into hostilities and unrest with the United States—"even providing them with arms with which to resist encroachments upon their land." *Id.* at 419.[24] As a result, the incipient American government was anxious to make peace with the powerful Six Nations of the Iroquois Confederacy. Achieving this peace was so important that George Washington himself made the difficult journey to upstate New York to help the negotiations in 1783. *Id.* at 418.

The Seneca Indians, therefore, did not negotiate treaties from a weakened position, since they had been neither conquered nor forced to surrender their land. As the Court has previously recognized, the six Tribes comprising the Iroquois Confederacy, including the Seneca Nation, were collectively "the most powerful Indian Tribe in the Northeast" at the time they entered into treaties with federal officials. *County of Oneida v. Oneida In-*

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[24] At the instigation of Great Britain, the Senecas and some other members of the Six Nations engaged in these hostilities in Western New York and joined with tribes in the Northwest Territory (which included at that time Ohio and all points to the West) to prevent further U.S. expansion in the Ohio Valley. Cohen (1972), *supra*, at 419. The Senecas were thus viewed as the "Doorkeeper of the West," reflecting their strategic importance to efforts to expand the country westward. *Id.*

dian Nation, 470 U.S. 226, 230 (1985). The "Iroquois Nation of Indians, from the time of the appearance of the first white settlers, continuously asserted their right to certain lands occupied by them." *United States v. City of Salamanca*, 27 F. Supp. 541, 545 (W.D.N.Y. 1939).

2. *The Six Nations Did Not Surrender Sovereignty In Their Treaties With The United States*

Against this backdrop of active Indian sovereignty, the Senecas, the other Nations of the Iroquois Confederacy and the Federal Government executed three treaties shortly after the end of the Revolutionary War. These treaties did not relinquish the sovereign status of the Six Nations. The first, the Fort Stanwix Treaty, Oct. 22, 1784, U.S.-Six Nations, 7 Stat. 15, provided for the release by the Indians of prisoners they had taken during the Revolution and for the establishment of a boundary line, to the west of which the Six Nations yielded their claims. Opp. Cert. App. AA1.[25] In exchange, the Six Nations were promised that "they shall remain secured in their peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of same." 7 Stat. 15, 15-16.

Shortly after the ratification of the Constitution, the Indians and the Federal Government, which feared Iroquois influence in the west, met in Ohio to "renew and confirm all the engagements and stipulations . . . [of the] Treaty at fort Stanwix." Fort Harmar Treaty, Jan. 9, 1789 U.S.-Six Nations, 7 Stat. 33 (Opp. Cert. App. AA4). Again, the Six Nations agreed to relinquish their claims to land west of the established boundary, and, again, the United States agreed, although this time unequivocally so, to "relinquish and quit claim" to all other land to the north and east covered by the agreement. 7 Stat. 34.

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[25] Citations to Opp. Cert. App. may be found in the appendix to our Brief in Opposition to Certiorari.

Several years later, and against a backdrop of wars with Indians in the Northwest Territory that had caused "decided unrest" among the Six Nations, Cohen (1972) at 419, Federal representatives met with the Nations in order to "remove from their minds all causes of complaint." Canandaigua Treaty of Peace, Nov. 11, 1794, U.S.-Six Nations, 7 Stat. 44 (Opp. Cert. App. AA8). In further defining various boundaries between the United States and the Six Nations, the United States in the Canandaigua Treaty promised never to "claim" or "disturb" the "Senekas" nor other members of the Iroquois Confederacy in "the free use or enjoyment" of their property. In return, the Six Nations promised "never [to] claim any other lands within the boundaries of the United States." The Nations also assured the people of the United States free and safe passage through their land. "These treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws." Cohen (1972) at 419. Thus, neither by conquest nor by treaty did the Six Nations relinquish their sovereign authority.

B. The Seneca Nation Entered Into A Treaty Specifically Exempting Indian Reservations From Taxation

The Seneca Nation of Indians, consistent with its sovereign status, successfully negotiated for a specific treaty exemption from state taxation. In 1842, the Senecas, the States of New York and Massachusetts, and the Federal Government executed the Buffalo Creek Compromise Treaty of 1842.[26] U.S.-N.Y.-Mass.-Six Nations, May 20,

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[26] The Buffalo Creek Compromise Treaty of 1842 followed on the heels of the Buffalo Creek Treaty of 1838, Jan. 15, 1838, U.S.-Six Nations, 7 Stat. 550, which had called for relocation of the Senecas and other Six Nation members to the territory west of the Mississippi. The Senecas repudiated that treaty, and it was replaced by the newly-negotiated Buffalo Creek Compromise Territory of 1842.

1842, 7 Stat. 586. That Treaty provided for the Federal Government to "protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from *all taxes*, and assessments for roads, highways or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them." 7 Stat. 590 (emphasis added).

It has been suggested that this Treaty speaks only to land, leaving states free to impose a tax on Indians on anything other than reservation property.[27] This strained interpretation, erroneous in our view, violates the plain language of the Treaty. It also is directly at odds with the principle long recognized by this Court that treaties with Indians should be read as the Indians themselves would have understood them. *See Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 177. This approach to treaties with Indians applies with equal force where taxes are in question. Thus, "[w]hile in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government." *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (citations omitted).

Until 1841, the Seneca Nation was subject to no taxes at all. Thus, a treaty providing them "free use and enjoyment of their land" would have been understood by them as a guarantee that no exactions would be made, either on the land itself or on activities on the land. Given their exemption from all taxes, there was no reason for the Senecas

[27] This argument was raised in *Snyder v. Wetzler*, currently pending before the New York Court of Appeals. The lower court in that case, the Appellate Division, read the Treaty very narrowly to authorize New York to exercise plenary tax jurisdiction over all activities occurring on Indian lands absent congressional prohibition. No. 67506, slip op. at 5, 6 (N.Y. App. Div. Nov. 10, 1993).

to negotiate for an exemption for activities occurring on lands over which they retained complete authority. Hence, the Seneca representatives present at the signing of each of the treaties before 1841 would have understood that no tax of any kind would be applicable in their lands. *See McClanahan*, 411 U.S. at 174[28] (finding exemption from income tax implicit in Navajo treaty despite silence in that respect); *Squire v. Capoeman*, 351 U.S. 1, 10 (1956) (construing treaty exempting Indian land from all "charge or incumbrance" to extend to all income derived directly therefrom). Following the State's 1841 effort for the first time to impose a tax, the Seneca Nation entered into the 1842 Treaty which contains the express prohibition of "all taxes." The Seneca representatives present at the signing of the 1842 Treaty surely would have understood it to confirm an exemption from all taxation. The Treaty language thus is a broad preclusion of taxation, whether on the land directly or on activities occurring on the land.

C. This Court's Decision In *The New York Indians* Case Confirms This Interpretation Of The Treaties

In *The New York Indians* case, 72 U.S. at 769, this Court carefully reviewed the treaties of the Six Nations, holding that the Seneca reservations are to be regarded as "wholly exempt from state taxation." 72 U.S. at 771. The Court's decision in *The New York Indians* has never been questioned nor overruled, and remains as controlling today as it was in 1866.

At issue in *The New York Indians* case was a tax on reservation land for the purpose of making road improvements on that land. New York argued that the tax was permissible because, in the event of a failure to remit the tax, New York would disturb only non-Indians who were on the reservation for nonpayment. The Court struck

[28] "The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to read as an ordinary contract[.]" 411 U.S. at 174.

down the tax, concluding that it was expressly precluded by the treaty, and that "all the treaties from 1784 down to" the Buffalo Creek Compromise Treaty of 1842, 72 U.S. at 769, supported this conclusion. Noting that the Indians remained in "their ancient possession and occupacy" (*id.* at 770), the Court reproached the State: "the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 771. Indeed, in closing, the Court went out of its way to praise New York for its 1857 statute that expressly prohibited taxation of Indian lands. *Id.*[29]

D. Federal Statutes Preserve The Exemption From Taxation Provided By The Treaties

Congress has specifically recognized the unique position of the Six Nations, having enacted special statutes concerning them only. In so doing, Congress has never acted to abrogate Seneca sovereignty. To the contrary, and consistent with its treaty obligations, the Federal Government has permitted New York to exercise only limited jurisdiction over the subjects of the Six Nations. At the same time, Congress has made clear that those limited grants of authority to New York do not include the authority to levy taxes on Indian reservations.

The history of disputes between Federal and State authorities concerning New York's supposed power to regulate the affairs of the Indians within its borders is long and contentious. From the outset, New York has advanced the belief that it enjoys plenary authority over

[29] The New York Statute, 1857 N.Y. Laws Ch. 45; N.Y. Indian Law, § 6 (McKinney 1950) provides:

> [N]o tax shall hereafter be assessed on either of said reservations. . . . for any purpose whatsoever, so long as said reservations remain the property of the Seneca Nation; and all acts of the legislature of this state conflicting with the provisions of this section are hereby repealed.

The legislative history of the 1857 law reveals New York's recognition that the title of the Seneca Nation to its lands is *"original, absolute,* and *exclusive."* New York Senate Doc. No. 28 (1857).

the Six Nations, a belief routinely rejected by the federal government. New York objected to the initial federal effort to negotiate a settlement with the Six Nations; it claimed the right to deal with the Indians separately and hoped entirely to remove them from the State. Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 Buff. L. Rev. 1, 4 (1959).[30] This position was resoundingly rejected by the federal treaties. After the treaties, the State policy regarding its so-called "Indian problem" was first to remove the Indians from the State and, failing that, later to "[e]xterminate the tribe and preserve the individual; make citizens of them and divide their land in severalty." *Id.* (quoting the Whipple Report prepared for the State Assembly in 1888). As the State's policies were in direct contravention of the federal policy favoring tribal self-government, the State was rebuked at each turn by state or federal courts and informed that it lack authority.[31]

More recently, following a decision by the Court of Appeals for the Second Circuit that New York law had no valid application to the Six Nations on their reservations "except so far as the United States has given its consent," *United States v. Forness*, 125 F.2d 928, 932 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 (1942), New York sought explicit authorization from Congress to apply its law to Indians. *See* Report of the Joint Legislative

[30] In fact, the State was so offended by the federal efforts that it even went so far as to arrest several of the federal agents involved with the Indian negotiations. *Id.*

[31] *E.g.*, *The New York Indians*, 72 U.S. at 762; *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885 (2d Cir. 1958), *cert. denied*, 358 U.S. 841 (1958), *vacated as moot*, 362 U.S. 608 (1960) (striking down state effort to unilaterally condemn reservation land and noting "Congress in . . . § 233 pointed up and reaffirmed its paramount authority over tribal lands"); *Buffalo, R. & P. R. Co. v. Lavery*, 27 N.Y.S. 443 (1894), *aff'd*, 43 N.E. 986 (1896) (holding state issued, federally unauthorized leases invalid); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942) (holding that Indian lands are beyond the operation of New York law).

Committee of the New York State Legislature (1945) (recommending that "Congress be asked to enact appropriate legislation for the recognition of New York State authority over the various Indian reservations lying within the state"). Congress acquiesced with respect to criminal jurisdiction by enacting 25 U.S.C. § 232, which extended New York's criminal statutes to crimes committed on Indian reservations.

With respect to civil jurisdiction over disputes involving Indians, however, Congress was manifestly more circumspect, limiting the jurisdiction of "the courts of the State of New York" to "civil actions and proceedings between Indians or between one or more Indians and any other person or persons. . . ." 25 U.S.C. § 233. Even then, Congress took pains to preserve the Six Nations' sovereignty, adding a choice of law proviso which authorized the Nations "to declare . . . those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue." *Id.* Congress also left New York courts free to "recogniz[e] and giv[e] effect to any tribal law or custom which may be proven to the satisfaction of such courts. . . ." *Id.* The section thus permits state courts to exercise jurisdiction over private disputes involving Indians and also to permit Indian law to govern the dispute.[32]

Congress then emphasized that this was a limited grant of judicial jurisdiction, one that did not carry with it any grant of legislative jurisdiction, or include the power to tax. Thus, Section 233 contains an express proviso that

[32] *See, e.g., In re Jimerson*, 255 N.Y.S. 2d 959, 961 (1965) ("The statute is permissive and nothing in its legislative history indicates that it was intended to do more than to open the State courts to Indians, if they should choose to use them."); *cf. Bryan v. Itasca County*, 426 U.S. 373, 377, 385 (1976) (similarly interpreting parallel language in 28 U.S.C. § 1360(a)).

"*nothing herein shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes. . . .*" The Senate Committee report on the law stresses that "State law does not apply to Indians except so far as the United States has given its consent." S. Rep. No. 1836, 81st Cong., 2d Sess. (1950).[33]

The "no taxation" proviso of Section 233 itself precludes application of the cigarette tax to sales conducted on Indian lands. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). By exempting "the lands within any Indian reservation" from all state taxation, the proviso reaches activities, like the sale of cigarettes, conducted on those lands. But even if this proviso is not read as a specific prohibition against on-reservation taxation, New York may exercise over the Senecas only that authority Congress has expressly allowed. Should New York wish to alter this result, its recourse lies not with this Court, but with Congress.

[33] Indeed, even New York's Tax Commissioner candidly conceded the point before the State legislature which ultimately refused to endorse the scheme presently before the Court: "Despite the fact that New York once sought a specific Congressional delegation of authority over Indians and Indian reservations, Congress has not given such authority. New York's general civil laws—including its tax laws—are not . . . applicable to tribe members on reservations." Hearings on N.Y. Senate Bill S7988 (May 2, 1992) (Statement of James W. Wetzler).

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND THE TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

MILHELM ATTEA & BROS, INC. AND ELIAS H. ATTEA, JR.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

BRIEF FOR THE MUSCOGEE (CREEK) NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state may regulate and tax commerce between a state cigarette wholesaler and an Indian tribe.

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COMES NOW the Muscogee (Creek) Nation and submits the following brief pursuant to Supreme Court Rule 37.3.

CONSENT TO FILING

The parties have consented to the filing of this brief. Letters memorializing this consent will be filed simultaneously with this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Muscogee (Creek) Nation (hereafter "Muscogee"), a federally-recognized Indian tribe, whose national capital is located near Okmulgee, Oklahoma. The Muscogee exercise jurisdiction over Indian country that overlaps 11 counties created by the State of Oklahoma, *e.g.*, Tulsa is an "old Creek town."[1] The Muscogee were removed on the "Trail of Tears"[2] to Indian Territory from their homelands in Georgia and Alabama. Within their Indian

[1] Angie Debo, *A History of the Indians of the United States* 4 (Norman, 1970).

[2] "The tragic suffering of the exiles on the Trail of Tears is familiar to all students of American history. It is matched only by the saturnalia of exploitation to which they were subjected by land speculators who crowded them from their homes before the time fixed for their emigration, and who possessed themselves of their individual allotments by every possible combination of violence and fraud." Angie Debo, *And Still the Waters Run* 5 (4th ed. Princeton Paperback Printing, 1991).

country, the Muscogee are wholesalers and retailers of tobacco products, including cigarettes. The Muscogee interests in this suit are: (1) Oklahoma, like New York (the petitioner), has misconstrued the *Potawatomi* decision[3] as authorizing states to legislatively impose regulations and taxes on cigarette trade with Indian tribes; (2) Oklahoma has seized Muscogee cigarettes and a vehicle pursuant to the putative authority of Oklahoma's unilateral, legislative solution;[4] and (3) the Muscogee are attempting to negotiate a compact with Oklahoma to resolve the cigarette tax dispute. If the decision below is not affirmed, the Muscogee may suffer further state depredations and be effectually precluded from compacting a resolution of tribal-state conflicts.

ARGUMENT

In adopting regulatory and taxing laws that burden wholesale cigarette trade with Indian tribes, petitioners (hereafter "New York") claim to be merely following *dicta* from a recent Supreme Court opinion. New York relies on the following language:

> And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra* [447 U.S.] at 161-162, or by assessing wholesalers who supply unstamped cigarettes to the tribal stores, *City Vending of Muscogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C.A. § 476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

Potawatomi, 498 U.S. at 514 (hereafter "*Potawatomi dicta*"). This language does not suggest that states can unilaterally solve their Indian commerce problems by legislative *fiat*. In fact, the opposite can be inferred. If state legislation was the answer, this Court would have only had to suggest that the state pass a law.

New York's regulatory and taxing scheme[5] effectively tells Indian traders that they may not engage in Indian commerce unless certain state rules[6] are followed. This is not only an invasion of constitutionally-established prerogatives, it is an attempted state pre-emption of federal law. The only *legislative* suggestion in the *Potawatomi dicta* is for the states to "seek appropriate legislation from Congress." This suggestion is consistent with the specific constitutional delegation of the authority for Congress to regulate trade with Indian tribes. U.S. Const. art. I, § 8, cl.

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[3] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

[4] 1992 Okla. Sess. Laws 1643, c. 339, codified at Okla. Stat. tit. 68, §§ 346-352 and §§ 424-429 (Supp. 1993).

[5] New York Tax Law, §§ 471, 474, 481, 1814, 1846, 1847; 20 N.Y. CRR §§ 335.5 and 336.7. Copies of these statutes are in the appendix to petitioner's brief.

[6] The "power to regulate commerce . . . [is the power] to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)

3. This authority was not delegated to the federal judiciary[7] nor to state legislatures. New York would allow states to unilaterally regulate Indian trade without the aid of federal law in contravention of the United States Constitution.

REASON FOR AFFIRMING THE DECISION BELOW

New York has asserted legislative power to unilaterally resolve cigarette tax collection problems with Indian tribes, but is now complaining to this Court when its own highest appellate court recognized this power grab, but refused to sanction it. "[W]e do not read the Court's suggestion for collection remedies as altering the established law regarding Federal preemption or validating comprehensive regulation by a State of the relationship between Indian traders and their Indian purchasers." *Milhelm Attea & Bros., Inc. v. Dept. of Taxation and Finance of New York*, 81 N.Y.2d 417, 427, 615 N.E.2d 994, 998, 599 N.Y.S.2d 510, 514 (1993).

The power to regulate Indian trade is specifically granted to Congress. This grant, like the other portions of

[7] "It is the Congress, and not the judicial department, to which the constitution has given the power to regulate commerce . . . The courts can never take the initiative on this subject." *Transportation Co. v. Parkersburg*, 107 U.S. 691, 701 (1883). New York implies that the only restraint on the state's power to regulate and tax trading with Indian tribes is whether or not this Court agrees with states that such regulation "is sound policy." *Br. for Pet.* at 19. Thus, New York is seeking to enlarge the federal judicial authority to include policy-making that is exclusively the province of Congress and the President.

the Commerce Clause ("among the States" and "with Foreign nations") was an explicit recognition of the need for one authority (the federal legislature, not the states) to regulate trade with Indian tribes. An implicit reason for this grant of authority was to protect the federal interest in treaties negotiated and to be negotiated by the United States with Indian tribes.[8] Had the states the authority to regulate Indian trade, tribes undoubtedly would not exist today.[9] If New York is permitted to regulate and tax

[8] Prior to ratification of the constitution, Indian treaties included clauses such as: "[The tribes acknowledge that they are] under the protection of the United States and of no other sovereign whatsoever . . . For the benefit and comfort of the Indians, and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians." *Treaty with the Chickasaw*, 1786, 7 Stat. 24, arts. II and VIII (Jan. 10, 1786). Most treaties subsequent to the adoption of the constitution contained specific guarantees by the federal government to protect tribes from state incursion on tribal jurisdiction. *See, e.g., Treaty with the Creeks, 1856*, 11 Stat. 699, art. 4 (Aug. 7, 1856) ("The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek.").

[9] When the political situation has been advantageous, states have unlawfully seized unilateral remedies to deprive tribes of rights protected by federal law. Just such a situation existed when this court decided *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). "Conflict between state and tribal government was not, however, all that was involved in *Worcester* . . . . The unilateral legislative action of the state of Georgia, and similar actions taken simultaneously by Mississippi, Tennessee, and other states, were in part attributable to the election of Andrew Jackson as president. Jackson was perceived as an avowed enemy to Indian interests in the affected states (despite his military alliance with some of the affected tribes), and these

Indian commerce, those tribes who have signed compacts with states[10] will have negotiated for naught. If compacting states have the power to unilaterally regulate Indian commerce, they will have no need to compact with Indian tribes and will either ignore existing compacts[11] or simply not renew them.

NEW YORK'S LAWS REGULATING AND TAXING CIGARETTE TRADE WITH INDIAN TRIBES ARE CONTRARY TO THE INDIAN COMMERCE CLAUSE AND THE INDIAN TRADER STATUTES

The constitutional grant of authority to Congress is "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Implicit in this language is that commerce with Indian tribes is separate and distinct from commerce with foreign nations and among the several states. However, the grant of power is identical ("to regulate"). The Federal Constitution arose

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states properly perceived that the federal government under Jackson's stewardship would not interfere in their unilateral extension of state authority over the tribe. Indeed, at least one historian has attributed to Jackson the following famous retort to the *Worcester* decision: 'John Marshall has made his decision; now let him enforce it.'. . . . For several years the Supreme Court decision was simply ignored – unprecedented constitutional phenomena, then and now." Robert N. Clinton, *et al.*, *American Indian Law* 28 (3rd ed. Michie Co., Va. 1991).

[10] "States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax" is one of the solutions suggested in the *Potawatomi dicta*.

[11] At least 9 tribes in Oklahoma have entered tribal/state compacts resolving cigarette tax disputes.

from an experience with the Articles of Confederation that the central government simply had insufficient power to properly function.

> The Commerce Clause is said to have been suggested by James Monroe of Virginia, afterwards President, who believed national regulation 'necessary to preserve the union; without it, it will infallibly crumble to pieces.' As a member from 1783 to 1786 of the Congress under the Articles of Confederation, he endeavored to secure for Congress the power to regulate commerce and thereby remove what he considered the **chief defect in the existing government**.

Thomas James Norton, *The Constitution of the United States, Its Sources and Its Applications* 51 (8th ed. The World Pub. Co., Cleveland & New York, 1943) (emphasis added). Accordingly, the grants of powers by the states to the federal government were intentionally greatly strengthened when the Constitution was adopted by the states. This was certainly true of the portion of the Articles of Confederation that discussed trade with the Indians: "[Congress has] the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, **not members of any of the states**, provided that legislative right of any state within its own limits be not infringed or violated . . . " *Articles of Confederation*, art. IX, ¶ 5 (emphasis added), reprinted in the U.S.C.A., U.S. *Const.* art. I, p. 11. Thus, when the Constitution was adopted, the clear inference was that the federal government was granted all of the power over Indian commerce to the exclusion of the states.

> Antecedently to the American Revolution the authority to regulate trade and intercourse

with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the prerogative of the British crown. And after the American Revolution, the like power would naturally fall to the federal government, with a view to the general peace and interest of all the states. Two restrictions, however, upon the power were incorporated with it into the confederation, which occasioned endless embarrassments and doubts . . . In this case, as in some other cases, the Articles of Confederation inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part, and letting the whole remain. The constitution has wisely disembarrassed the power of these two limitations; and has thus **given to congress, as the only safe and proper depository, the exclusive power**, which belonged to the crown in the ante-revolutionary times; **a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians** . . .

. . . It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, and inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The **trade with them is, in all its forms, subject exclusively to the regulation of congress**. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear.

Joseph Story, *Commentaries on the Constitution* §§ 533-534 (Carolina Academic Press 1987) (1833) (emphasis added).

The Commerce Clause has been construed to preclude any state-imposed burden on interstate trade either *per se* or pre-emptively if congressional enactments signal an intention to "occupy the field." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In either event, the New York statutes run afoul of federal law.

In construing the interstate regulatory power, this Court has recognized the practicalities of commerce among the states and adopted a two-prong doctrine. *First*, congressional power is exclusive as to those phases of interstate commerce requiring "uniform regulation." *Second*, for those phases not requiring uniform regulation, the states enjoy a concurrent power of regulation subject to Congress' overriding power. *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 327 (1917). However, the history and practicalities of Indian commerce (as undoubtedly with foreign commerce) are such that this Court should construe the Indian commerce clause as granting exclusive power.[12]

Chief Justice Marshall in the seminal Interstate Commerce case explained that the commerce power is not "in its own nature . . . capable of residing in, and being exercised by, different authorities at the same time." *Gibbons*, 22 U.S. at 199-200. This language is even more

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[12] Several Indian tribes have Indian country in more than one state, e.g. Navajo Indian Reservation (Arizona, New Mexico and Utah), Standing Rock Indian Reservation (North Dakota and South Dakota).

appropriate in describing Indian commerce. As Marshall went on to say, "[a state in regulating interstate commerce] is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." New York's desire to collect cigarette taxes is simply not a sufficient legal reason for judicially amending the Federal Constitution.[13]

Even if the Indian commerce clause is not construed as an exclusive grant of power, Congress has clearly pre-empted and fully occupied the field of Indian trading. New York argues that the Indian trader statutes were not enacted to allow tribes to "market a tax exemption." The legislative intent, except as to whether Congress intended to occupy the field, is not relevant to the question of federal pre-emption. Federal pre-emption will always have effects not contemplated nor intended. The intent of the federal Indian trader statutes was, as this Court has previously held, to occupy the field of Indian commerce.

> Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Article I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.

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[13] *Cf. Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951). A legitimate state objective does not validate state laws imposing burdens on interstate commerce.

Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685, 691 n. 18 (1965). If an incidental result of the Indian trader statutes is that goods can be purchased cheaper in Indian country than in the surrounding state, this does not *ipso facto* empower New York to ignore federal pre-emption any more than a similar price differential would authorize New York to regulate trade with New Jersey or Potomac, Maryland, to regulate trade with Rockville, Maryland. Tax rate differentials among communities exist everywhere and do not lose their validity because one community has a lower rate, nor should they lose their validity simply because the community happens to be composed of Indians.

Tax differentials among adjacent jurisdictions are not anomalies, but consistent with the constitutional plan. The existence of these differentials acts as a natural limit on the apparently unrestrained inclination of politicians to raise taxes.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949).

Although the Indian trader statutes may not have anticipated tax differentials among adjacent tribal jurisdictions and states, they were adopted to occupy the field

of Indian commerce precluding state regulation as fully intended by the United States Constitution.

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a 'sweep as broad as [their] language,' . . . and interpret them in light of the intent of the Congress that enacted them.

Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980) (citations omitted).

By targeting a particular commodity (cigarettes) for special taxation, states, themselves, have created tax differentials and the perceived "cigarette tax collection problem with Indian tribes." States had the option of leaving cigarettes, like every other item, subject to sales taxes. However, because tobacco was a convenient tax target, states decided to tax cigarettes separately so that the rates of taxation could be raised without the magnitude of opposition that usually greets proposed increases in sales taxes.[14] The cigarette tax purports to be a tax on the ultimate consumer. However, this is not how states have structured the tax collection procedure. States pre-collect the tax from wholesalers who affix a stamp as proof that state cigarette taxes have been paid. This methodology differentiates "cigarette tax" collections from usual tax on

[14] *See* Br. of the States of Wash., *et al.* at 1, n. 2 (Dec. 15, 1993) (hereafter "States Br."). As Washington points out, it can tax cigarettes at nearly five times the rate of other items.

commodities sold to the "ultimate consumer."[15] One result of this state tax policy is that the smoker is now often paying more tax on a pack of cigarettes than he is paying for the commodity itself.[16] Cigarette tax rates would be politically impossible to impose on commodities in general. In targeting the sale of one commodity for special tax treatment, states have unilaterally created their own tax collection problems.

As the market for tobacco products has declined, jurisdictions have correspondingly raised taxing levels to confiscatory levels. "[C]igarette consumption in 1993 will likely decline for the ninth consecutive year, continuing the pattern in 10 of the last 11 years." United States Department of Agriculture, *Tobacco Situation and Outlook Report*, TS-224, 4 (Sept. 1993). Total manufactured United States cigarette consumption reached a peak of 640 billion in 1981, but dropped over 20% during the next 10 years, reaching 510 billion by 1991. *Id.* at 4, Table 2; *see also* A2 to A4. *Per capita* consumption has dropped every year since 1973 (4,148) to an estimated 2,713 in 1991. *See* A4. Nevertheless, the State of Washington hopes to finance "a major health care measure" from new cigarette taxes. *See* States Br. at 4, n. 5. If these dreams of new tax revenues fail to materialize, states cannot accurately blame Indian tribes.

[15] States Br. at 3, n. 3.

[16] Using the State of Washington as an example, depending on the weight of the tobacco, between 44 to 58.98 percent of the cost of a carton of cigarettes is directly attributable to state and federal taxes. *See* A1.

To avoid the cost and inefficiencies of collecting taxes from individuals, the states seek to force tribes to be state tax collectors. The problem has arisen not from any Indian effort to market a tax exemption,[17] but from the states' targeting of a particular commodity for extraordinary taxation, thereby creating tax differentials that encourage consumers to purchase the taxed commodity in other jurisdictions. Only Congress is Constitutionally vested with the authority to regulate trade among consumers, retailers, wholesalers and Indian tribes. Unilateral state regulation of Indian commerce is Constitutionally impermissible and invades an area enjoyed exclusively by Congress.

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[17] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). *See Colville*, 447 U.S. at 159; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976).

CONCLUSION

The decision of the Court of Appeals for the State of New York should be affirmed.

Respectfully submitted,

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January, 1994

Cost of Carton of Cigarettes in Washington

Federal tax	26 USCA 5701	Tax	Number of Cigarettes	Tax per Cigarette	Tax per Carton
	Less than 3 lbs per 1000	$12.00	1000	$0.01	$2.40
	Greater than 3 pounds per 1000	$25.20	1000	$0.03	$5.04

Carton		Per pack	Per carton	
	cigarettes	20	200	
Less than 3 lbs per 1000				
	Median Price	$17.70	100.00%	States' Amici Brf at 1, n.2
	Washington tax	$5.40	30.51%	States' Amici Brf at 1, n.2
	Federal tax	$2.40	13.56%	26 USCA 5701
	Direct taxes	$7.80	44.07%	
Greater than 3 pounds per 1000				
	Median Price	$17.70	100.00%	States' Amici Brf at 1, n.2
	Washington tax	$5.40	30.51%	States' Amici Brf at 1, n.2
	Federal tax	$5.04	28.47%	26 USCA 5701
	Direct taxes	$10.44	58.98%	

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Total Manufacturing U.S. Cigarette Consumption, 18 and Over

Four Year Periods	64	68	72	76	80	84	88	28 92	96
Total Consumption (billions)	511.3	545.6	566.8	613.5	631.5	600.4	562.5	510	
% change		6.71%	3.89%	8.24%	2.93%	-4.92%			
Per capita	4194	4186	4043	4092	3844	3446	3096	2713	
% change		-0.19%	-3.42%	1.21%	-6.06%	-10.35%	-10.16%	-12.37%	
					28	year	Change	-35.31%	
						Annual	Average	-1.26%	

Ten Year Period	81	82	83	84	85	86	87	88	89	90	91
Total Consumption (billions)	640	634	600	600.4	594	583.8	575	562.5	540	525	510
% change		-0.94%	-5.36%	0.07%	-1.07%	-1.72%	-1.51%	-2.17%	-4.00%	-2.78%	-2.86%
Per capita	3836	3739	3488	3446	3370	3274	3197	3096	2926	2817	2713
% change		-2.53%	-6.71%	-1.20%	-2.21%	-2.85%	-2.35%	-3.16%	-5.49%	-3.73%	-3.69%
								Per Capit	10-year change		-29.28%
									Annual Average		-2.93%
								Consumption			-20.31%
											-2.03%

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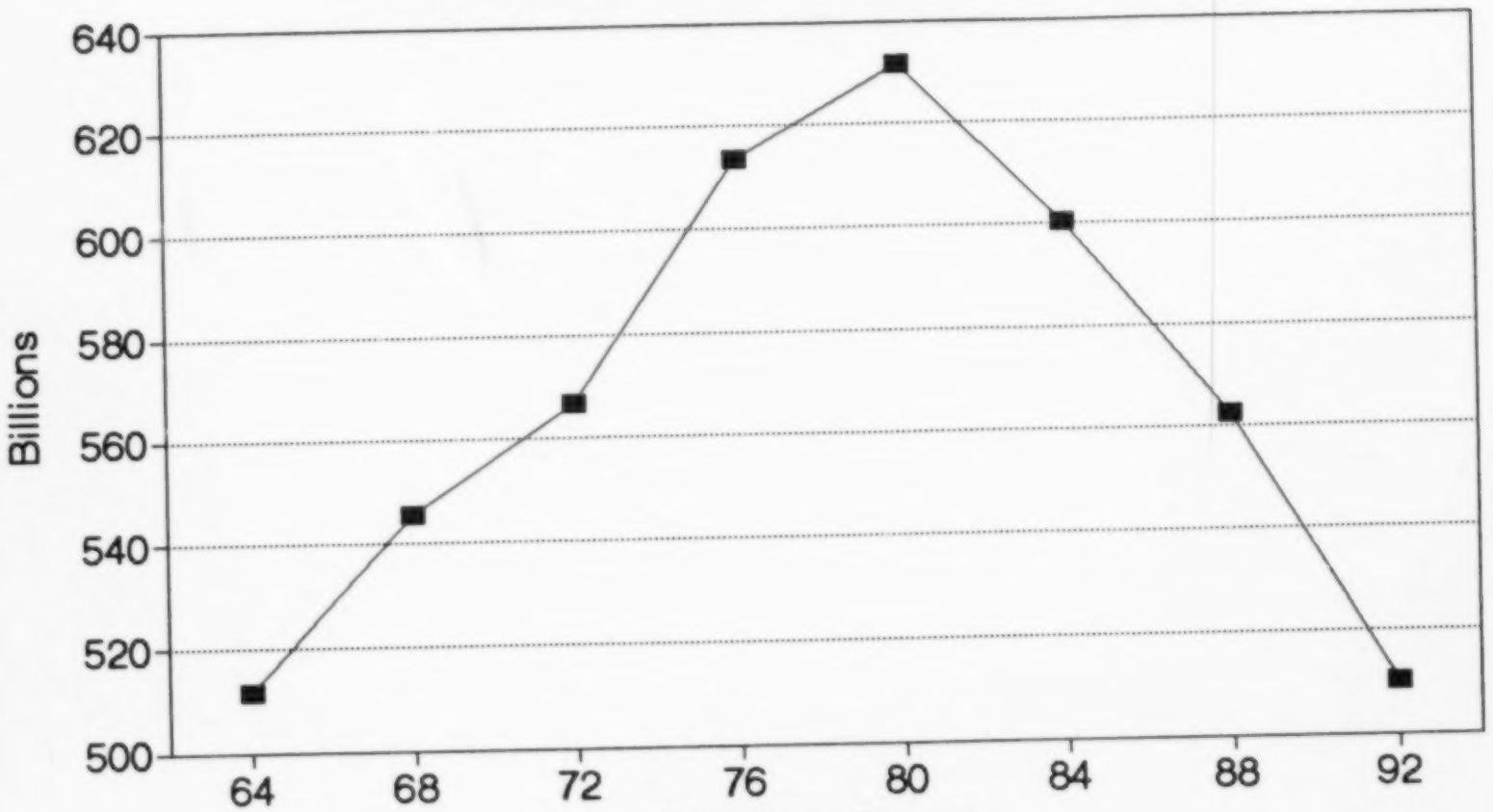
Tobacco Situation and Outlook Report," United States Department of Agriculture Economic Research Service, TS-224, p. 4 and Table 2 (Sept. 1993)

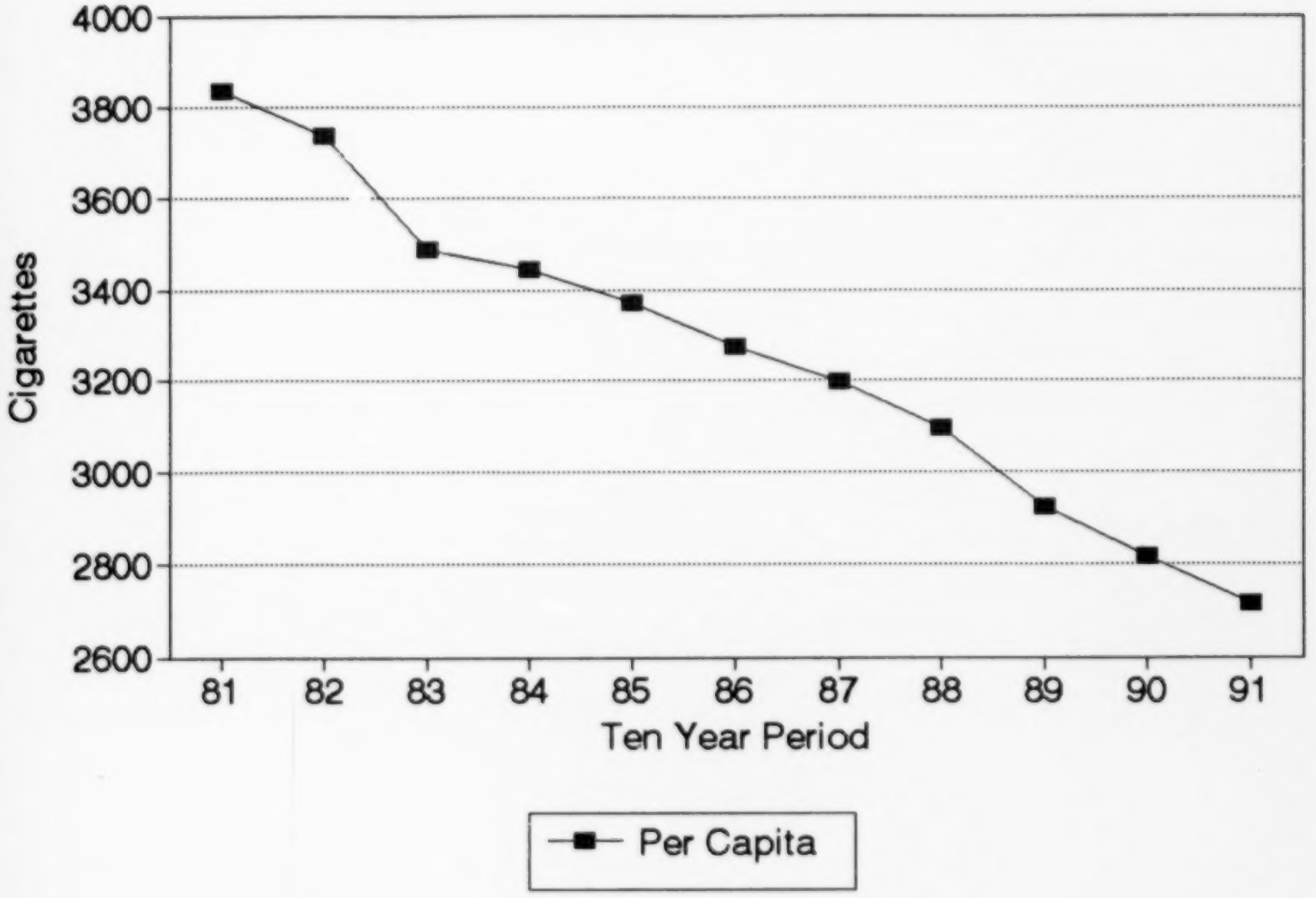
Total Cigarette Consumption

In US During 4 Year Periods from 1964



Cigarette Per Capita Consumption

In US During 10 Year Period from 1981



IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioners,

v.

MILHELM ATTEA & BROS., INC.,
Respondent.

v.

ELIAS H. ATTEA, JR.,
6175 Stickler Street, Clarence, New York 14031,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF *AMICI CURIAE* OF SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

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IN THE

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No. 93-377

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
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On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF *AMICI CURIAE* OF SAINT REGIS MOHAWK TRIBE AND MOHAWK TAX STEERING COMMITTEE IN SUPPORT OF RESPONDENTS

The Saint Regis Mohawk Tribe and the Mohawk Tax Steering Committee submit this brief as *Amici Curiae* in support of respondents Milhelm Attea & Bros., Inc. and Elias Attea, Jr.[1] The Iroquois Business Association also joins this brief.

[1] This brief is filed with the permission of the parties. Written consents have been provided to the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The Saint Regis Mohawk Tribe (the "Tribe") is a federally recognized, sovereign Indian nation. Its lands straddle the border between the United States and Canada. The Tribe is one of the six nations (the "Six Nations") that collectively constitute the Iroquois Confederacy.

The Mohawk Tax Steering Committee (the "Steering Committee") was formed during 1992 under the auspices of the Saint Regis Mohawk Tribal Council, an elected governing body of the Tribe. It consists of representatives of the Council, traditional Mohawk people (*i.e.*, those who follow the "Longhouse" form of government), the Mohawk business community, and other groups.

The function of the Steering Committee is to represent the Mohawk people, collectively, and to provide representation on behalf of individual Mohawks, before the Internal Revenue Service, the U.S. Department of the Treasury, federal and state courts, the U.S. Congress, the State of New York and its Department of Taxation and Finance, and the New York legislature in cases involving alleged infringement on sovereignty by reason of taxation, and in general, alleged illegal taxation of Mohawks.

The State of New York imposes tax on the possession of cigarettes for sale. The case before this Court involves an attempt by the State, through regulations promulgated by its Department of Taxation and Finance, to require respondents, both of whom are wholesalers, to precollect this tax on sales of cigarettes to Indian retailers in Indian territories.

Respondents engage in trade with Indian retailers pursuant to federal Indian trader licenses issued by the Bureau of Indian Affairs of the U.S. Department of the Interior. They contend that only the federal government may regulate commerce between federally licensed Indian traders and their Indian customers, and, accordingly, that the regulations are invalid, as the New York Court of Appeals ruled below.

The Tribe and the Steering Committee have a significant and direct interest in this case for three reasons. First, the case involves the attempted state regulation of transactions involving Indian retailers and occurring within the boundaries of Indian territory.[2] Second, the regulatory regime envisions direct participation by the Tribe and other Indian nations with territory that borders New York. Third, the regulatory regime will result in extraordinary burdens on Indian retailers and/or impermissible taxation of consumers who are not subject to New York's cigarette tax.

In summary, this case involves the imposition of significant burdens on commerce within Indian territory between non-Indian suppliers and Indian retailers. Respondents' interests stem from their status as federal licensees. The Tribe and the Steering Committee concur with respondents' position. In addition, however, the Tribe and the Steering Committee respectfully contend that analysis of this case also requires consideration by this Court of the unique and federally recognized interests of the Iroquois nations and their people.

SUMMARY OF ARGUMENT

The State of New York Court of Appeals correctly held that federal regulation of commerce between licensed Indian traders and Indian retailers pre-empts New York's regulatory scheme for precollection of taxes on cigarettes that may be sold to non-Indian customers in Indian territory.

The analytical framework set forth by this Court requires examination of the broad policy underlying the federal Indian trader laws and notions of Indian sovereignty rooted in traditional tribal independence. In light

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[2] For many Iroquois, the term "reservation" has negative racial, ethnic, and cultural connotations. This brief refers to areas that are within the governmental jurisdiction of the Six Nations as "territories," rather than "reservations."

of the federal, tribal, and state interests at stake, enforcement of New York's cigarette tax regulations would interfere with virtually every aspect of commerce between Indian traders and Indian merchants on Indian land, thereby violating federal law.

The regulations in controversy would invest New York's Department of Taxation and Finance with unfettered control over both the number of untaxed cigarettes available to be sold by Indian traders and the persons permitted to purchase and resell such cigarettes. Exercise of such control would conflict directly with section 261, title 25 of the U.S. Code, and would usurp proper Indian sovereignty over commerce in Indian territory. The regulations would impose onerous and expensive paperwork and recordkeeping requirements on all federally licensed Indian traders, Indian retailers, and individual Indian consumers in their dealings on Indian land. In addition to burdening commerce between licensed Indian traders and their Indian customers, the State's licensing procedure also would undermine tribal sovereignty. Finally, it is likely that New York's regulations would allow for insufficient supplies of untaxed cigarettes for sale to Indian consumers on Indian territory. That would burden the licensed traders, Indian retailers and wholesalers, and, most clearly, individual Indians.

The pre-emptive effect of the federal Indian trader laws with respect to commerce between the traders and their Indian customers is not limited by this Court's holdings in cases involving the duties of Indian merchants to collect sales taxes on sales to non-Indian customers on Indian territory. Those cases did not consider the impact of federal Indian trader laws.

ARGUMENT

I. THE NEW YORK STATE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS' REGULATORY SCHEME IS PRE-EMPTED BY FEDERAL LAW.

The New York State Court of Appeals held that the tax provisions in question, although designed to ensure the collection of tax from non-Indian consumers, encroached to a significant degree on trade between wholesale distributors and their Indian customers, and thus were pre-empted by federal law. The holding of the Court of Appeals was correct, and should be affirmed.

A. Federal Law Pre-Empts State Regulations that Conflict or Interfere with Federal Law Applicable to Transactions Between Indians and Federally Licensed Indian Traders.

Rulings issued by this Court, beginning with *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965) ("*Warren Trading Post*"), and including the more recent decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*White Mountain*"), establish strict limits on state regulation of commercial relations with the Indian nations. New York State's cigarette tax regulations must be evaluated in light of these precedents and their historical antecedents.

Federal control of commercial and other relations with the Indian nations is rooted deep in our history. In part, these matters have been treated as a federal responsibility because of the unique status of the Indian nations as independent peoples. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-69 (1973). Underpinning the federal role is the Indian Commerce Clause of the United States Constitution, which grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The federal government has exercised its special authority to regulate dealings with the Indian nations from the outset of the Republic. In 1790, the first Congress of the United States passed a statute "to regulate trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, 1 Stat. 137. From that day forward, federal statutes have governed commerce with the Indians in their own territory. These federal statutes are codified in their current form at title 25 of the U.S. Code, sections 261 through 264, and are referred to collectively as the "Indian trader laws." The essential operative provision grants the Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes" and to make rules "specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[3] A comprehensive scheme of federal regulations implements the statutes. *See, e.g.*, 25 C.F.R. §§ 140.1-.26.

The Indian trader laws are one component of the wide range of federal policies, procedures, statutes, and regulations governing virtually every aspect of dealings between Indians, in their own territories, and outside interests. A panoply of federal law has been enacted to protect and enhance the ability of Native American nations and individuals to earn a livelihood, taking into account Indian sovereignty and right to self-government on Indian land.

Pre-emption doctrine, as developed by this Court, recognizes the special nature of the relationship between the

[3] This Court has noted that the Indian trader laws constitute a "statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Warren Trading Post*, 380 U.S. at 691. As *Warren Trading Post* itself makes clear, however, the pre-emptive effect of a federal regulatory scheme applicable to Indians is not restricted by the original congressional intent for the statutes involved.

Indian nations and the United States.[4] In *Warren Trading Post*, this Court unanimously concluded that the "apparently all-inclusive" federal Indian trader laws "seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders." 380 U.S. at 690. *Warren Trading Post* involved Arizona's attempt to impose a tax of two percent on the gross receipts of a retailer whose business was located in Navajo territory and who was a federally licensed Indian trader. The Court explained that:

> [A]ssessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress . . . . This state tax . . . would put financial burdens on appellant [the federally licensed Indian trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed . . . .

380 U.S. at 691. The Court concluded that Arizona's laws imposing tax on a federally licensed Indian trader's sales to Navajos on Navajo territory were pre-empted by federal law.

Subsequently, this Court held that the Indian trader laws also pre-empt imposition of Arizona's gross receipts tax on a one-time sale of farm equipment to an enterprise owned by the Gila River Indian Tribe and operating on Gila River territory, even though the non-Indian supplier was not a federally licensed trader. *Central Machinery*

[4] In contexts other than this one, the scope of federal pre-emption depends upon whether Congress explicitly stated its intention to pre-empt state regulation. It is well settled, however, that "state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." *White Mountain*, 448 U.S. at 151.

Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980). Determining that the transaction in question "falls squarely within the language of 25 U.S.C. § 264," the Court concluded that "[i]t is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." 448 U.S. at 165.

In a number of subsequent cases, the Court has had occasion to explicate in greater detail the *Warren Trading Post* analysis, as applied in the context of other federal statutes. These cases establish a more articulated framework for analyzing the pre-emptive effect of federal law on state regulation of commercial relations with the Indian nations.

In *White Mountain*, the Court reviewed the factors to be considered in cases where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. 448 U.S. at 144. At issue in that case was whether federal statutes and regulations vesting the Bureau of Indian Affairs with broad authority over the sale of timber on Indian territory, including the power to designate prices and yields, pre-empted motor carrier license and fuel taxes sought to be imposed by the State of Arizona. The litigant in question, a logging company engaged by the tribal timber enterprise to cut and transport trees, operated solely on roads located on Indian lands. In holding that Arizona's tax regime was pre-empted by federal law, the Court stated that it is necessary to examine

> the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for *a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in*

> *the specific context, the exercise of state authority would violate federal law.*

448 U.S. at 144-45 (emphasis added). The Court concluded that the state's interest in raising revenue could not overcome the federal interest, as embodied in the comprehensive regulatory scheme governing timber operations on Indian territory, and the interest of the tribe itself, that is, "notions of sovereignty that have developed from historical traditions of tribal independence."[5] *Id.* at 145; *see also Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 836-38 (1982) (under *White Mountain*, federal regulation of financing and construction of educational facilities in Indian territory pre-empts imposition of gross receipts tax on non-Indian construction company); *cf. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989) (under *White Mountain*, federal regulation of Indian mineral leasing does not pre-empt state severance taxes on oil and gas production by non-Indian lessee where Congress expressly waived exemption from such taxes and tribe not burdened by the tax regime).

In the instant case, New York seeks to require the collection, by federally licensed traders, of taxes purportedly due on cigarettes destined for sale to non-Indian consumers in Indian territory. Even assuming that a valid state interest underlies New York's precollection regime,[6] under the *Warren Trading Post* line of cases,

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[5] Federal law and policy in this area are closely interwoven. As the *White Mountain* Court noted, "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain*, 448 U.S. at 144 (*citing McClanahan v. Arizona State Tax Comm'n, supra*, 411 U.S. at 174-75).

[6] *Amici* do not concede that New York has the right to impose tax on transactions occurring between Indian merchants and their customers on Mohawk territory. The treaties in force between the

New York's tax regulations nevertheless are pre-empted because they impinge on the interest of the federal government in regulating commerce with the Indians, and the interest of the Indian nations in maintaining independence from state regulation of transactions on Indian lands.

B. New York's Regulatory Scheme Violates Federal Law by Interfering with Commerce Between Indians and Federally Licensed Indian Traders.

1. *New York's Tax Scheme Comprehensively Regulates Sales by Indian Traders on Indian Territory.*

Section 471 of the New York Tax Law imposes a tax "on all cigarettes possessed in the state by any person for sale . . . , except that no tax shall be imposed under such circumstances that this state is without power to impose such tax." The tax is intended to be borne by the retail cigarette consumer. Tax Law § 471(2). Pursuant to this provision, the New York Department of Taxation and Finance promulgated a comprehensive set of regulations aimed at regulating the distribution, sale, and consumption of cigarettes in sovereign Indian territories for the sole purpose of collecting the state cigarette tax on the sale of cigarettes by Indian retailers to non-Indian or non-member Indian consumers.

The regulatory regime requires Indian (and non-Indian) retailers and Indian wholesalers who sell or intend to sell untaxed cigarettes in Indian territories to register with

United States and the Six Nations of the Iroquois Confederacy confirm that the Six Nations retain their aboriginal sovereignty over the territories reserved exclusively to them. *See, e.g.*, Treaty with the Six Nations art. III, 7 Stat. 15, 15-16 (1784). The Six Nations, including *amicus* Saint Regis Mohawk Tribe, were never subjugated by the United States and have never ceded any of their aboriginal sovereignty over tribal lands. This Court has not ruled on whether state action, including any sales or excise taxes, apply in these precise circumstances.

the Department of Taxation and Finance. *See* 20 NYCRR § 335.6(b)(4), (f)(2).[7] An Indian retailer may purchase untaxed cigarettes from a federally licensed Indian trader only if the State has issued a "certificate of registration." *See id.* § 335.6(f)(3). Registration is required because so-called "qualified sales" in Indian territories are made without the prepayment or precollection of tax. *See id.* § 335.6(b)(5). In order to effectuate a qualified sale in an Indian territory, the purchaser of cigarettes is required to give the seller proof of entitlement to purchase untaxed cigarettes. *Id.* §§ 335.6(d)(2) (purchases by an exempt Indian nation or tribe), (e)(2) (purchases by a qualified Indian consumer), and (f)(4) (purchases by a registered dealer).

Only agents who are licensed by the Department of Taxation and Finance to purchase and affix cigarette tax stamps are authorized to possess "untaxed" cigarettes to transport them onto Indian territory for subsequent "qualified sales." *See id.* § 335.7(b)(2). Each such agent licensed by New York who sells to Indian retailers or wholesalers on Indian territory also must be a federally licensed Indian trader. The amount of untaxed cigarettes which may be sold to Indian nations or tribes or sold to registered dealers for qualified re-sale will be determined by the State. *See id.* §§ 335.7(b)(3), (c), and (d).

If an Indian nation or tribe agrees with the Department of Taxation and Finance to regulate, license, or control the sale of untaxed cigarettes in the territory, then the wholesale agent must obtain approval from the nation or tribe, prior to each sale, of the agreed upon number of untaxed cigarettes he may deliver to the Indian territory. *Id.* § 335.7(c)(1). Otherwise, prior to each sale, the agent must ask the Department of Taxation and

[7] Section 335 of these regulations was renumbered as section 336, as of December 19, 1990, without substantive change. For the sake of clarity in citing the opinions below and other briefs, the prior numbers will be used.

Finance for approval of the amount of untaxed cigarettes he may deliver to the Indian territory. *Id.* § 335.7 (c)(2).[8]

Department of Taxation and Finance approval of the number of untaxed cigarettes that may be delivered will be based on evidence of valid purchase orders of quantities "reasonably related to the probable demand of qualified Indian consumers in the trade territory" of the Indian nation or tribe or of the registered dealer involved. *Id.* § 335.7(d)(1). Probable demand is determined by the Department of Taxation and Finance. In those cases where the Indian nation or tribe agrees to regulate the sale of untaxed cigarettes, or presumably otherwise collects data on the number of sales to qualified consumers, the Department of Taxation and Finance will "consult" with the nation or tribe regarding its evidence on probable demand. *Id.* § 335.7(d)(2)(i). In the absence of such regulation or evidence, the amount of untaxed cigarettes that may be delivered to an Indian territory will be equal to the average daily cigarette consumption in the State of New York, multiplied by the number of enrolled members of the nation or tribe. *Id.* § 335.7 (d)(2)(ii). The Department of Taxation and Finance also will "consider" evidence provided by registered dealers relating to probable demand. *See id.* § 335.7 (d)(4).

The Department of Taxation and Finance will consider the same sources of evidence to determine the trade territory of an Indian nation or tribe or of a registered dealer. *Id.* §§ 335.7(d)(3)(i), (d)(4). Otherwise, the Department of Taxation and Finance will determine the trade territory "based upon the information at its disposal." *Id.* § 335.7(d)(3)(ii).

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[8] Whether an Indian nation or tribe participates in the regulatory regime or not, the Department of Taxation and Finance will determine the total amount of untaxed cigarettes that may be sold. *See* 20 NYCRR § 335.7(d).

It is evident from the foregoing that New York's regime for precollection of cigarette taxes would affect virtually every aspect of transactions occurring in Indian territory between federally licensed Indian traders and their Indian customers.

2. *New York's Tax Regime Conflicts with Federal Law and Usurps Tribal Self-Government.*

The regulations under scrutiny purport to control each basic component of cigarette sales by non-Indian wholesalers to their Indian customers in Indian territories—who is entitled to sell untaxed cigarettes, who is entitled to purchase such cigarettes, and the quantity of such cigarettes that may be sold. In addition, the regulations impose comprehensive and burdensome licensing and recordkeeping requirements on both wholesalers and Indian merchants. To say that these regulations interfere with Indian trade is an extreme understatement. They are in direct conflict with the federal Indian trader laws, burden dealings between Indians and Indian traders, and wrest from tribal governing bodies the authority to regulate transactions occurring in Indian territories.

New York's regulations are in direct conflict with section 261 of the Indian trader laws. In that statute, Congress granted the Commissioner of Indian Affairs "*sole* power and authority . . . to make . . . rules . . . specifying the kind and quantity of goods . . . which . . . shall be sold to the Indians." 25 U.S.C. § 261 (emphasis added). Yet the regulations in question purport to control commerce in untaxed cigarettes between federally licensed Indian traders and their Indian customers in Indian territories.

The New York regulations permit only those persons registered with the Department of Taxation and Finance to purchase and recell untaxed cigarettes in Indian territories. *See* 20 NYCRR § 335.6(b)(4). Accordingly, the right of a federally licensed Indian trader to sell untaxed

cigarettes to Indian purchasers is conditioned on registration with the State by the purchasers, who must provide proof of entitlement to purchase such cigarettes. *Id.* § 335.6(g). Further, the import of the regulations is that the Department of Taxation and Finance has the ultimate authority to determine the number of untaxed cigarettes that may be sold in Indian territories. If an Indian nation or tribe does not agree to regulate sales of untaxed cigarettes in its territory in accordance with the dictates of the Department, then the Department's authority over such sales will be unfettered. Absent regulation by the Indian nation or tribe, the Department will calculate both (1) the trade territory "based upon the information at its disposal," *id.* § 335.7(d)(3)(ii), and (2) probable demand "based upon the New York average consumption per capita, . . . multiplied by the number of enrolled members of the affected nation or tribe," *id.* § 335.7(d)(2)(ii). At most, the Department also will "consider" any evidence of probable demand submitted by registered dealers (such as Indian retailers), *id.* § 335.7(d)(4), and perhaps by the nation or tribe itself. In any event, absent regulation by the Indian nation or tribe, the Department will determine the total number of untaxed cigarettes permitted to be sold, and must approve beforehand each separate sale of untaxed cigarettes by a federally licensed Indian trader to an Indian retailer on Indian territory.

If an Indian nation or tribe agrees to regulate cigarette sales in its territory, it must negotiate with New York's Department of Taxation and Finance to determine the "agreed upon amount of [untaxed] cigarettes" that can be brought into the territory by federally licensed Indian traders. *See id.* § 335.7(c)(1). That number must be "reasonably related to . . . probable demand of qualified Indian consumers in the trade territory." *Id.* §§ 335.7(d)(1), (2)(i). The Department of Taxation and Finance will "consult" with the Indian nation or tribe regarding any evidence it may have relating to (1) probable demand, *id.* § 335.7(d)(2)(i), and (2) the "regulated and/or licensed sellers located on its reservation," *id.* § 335.7(d)(3)(i).

It is clear that the Department of Taxation and Finance alone will make the final determination of how many untaxed cigarettes may be brought into Indian territory by federally licensed Indian traders, even in cases where the Indian nation or tribe agrees to regulate cigarette sales in accordance with the Department's regulations. At most, the Department will "consult" with the Indian nation or tribe and then will determine probable demand within the trade territory. The Department will decide whether the number of untaxed cigarettes to be "agreed upon" between the nation or tribe and the Department in fact is reasonably related to that probable demand.

In short, the State of New York asserts the authority to control the very matters expressly reserved to the Commissioner of Indian Affairs in section 261 of the Indian trader laws. Thus, New York's precollection scheme, on its face, conflicts with federal statutes designed to govern commercial relations with the Indian nations. This should be sufficient to establish that the regulations are pre-empted by federal law. In addition, however, it is clear that New York's regulations will, in practice, both interfere with Indian commerce and offend the sovereignty of the Indian nations.

Under the regulations, each Indian nation or tribe, including *amicus* Saint Regis Mohawk Tribe, must obtain an "exempt organization certificate" from the Department of Taxation and Finance. *Id.* § 335.6(d)(ii). Each retailer and Indian wholesaler must obtain a "certificate of registration." *Id.* § 335.6(f). Each Indian consumer must "issue to the seller . . . a properly completed certificate of individual Indian exemption." *Id.* § 335.6(e)(2). Upon making "an initial purchase," the pur-

chaser must provide the supplier with a copy of the applicable certificate. *Id.* § 336.6(g)(1). Each subsequent delivery of untaxed cigarettes must be "substantiated as being exempt from tax with an individual bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser." *Id.* Such substantiation "must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such cigarettes. *Id.* § 335.6(g)(2). The seller must retain copies of the substantiation, *id.*, and "establish an acceptable system of associating [the] copies . . . with the applicable tax exemption certificates initially received from the purchasers." *Id.* § 335.6(g)(3).

These rules will require detailed documentation of every transaction between federally licensed Indian traders and their Indian customers on Indian territory and every transaction between Indian retailers and Indian consumers. The expense and paperwork burden imposed by this unwieldy system will be oppressive.[9]

Under New York's regulatory scheme, there is no assurance that Indian consumers will have access to sufficient quantities of untaxed cigarettes to satisfy their personal requirements. Indeed, it is virtually certain that Indian consumers will be forced to purchase taxed cigarettes. Moreover, there is no mechanism in the regulations for refunding state cigarette taxes illegally paid. *See* Tax Law § 476 (refund procedure for agents, dealers, and distributors, but not consumers).

[9] In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 159-60 (1980), this Court upheld Washington State's requirement that Indian merchants retain records of Indian purchasers, their tribal affiliations, the Indian territory in which each sale took place, and the dollar amounts and dates of each sale. As the Court of Appeals concluded below, the requirements that New York State seeks to impose are more burdensome than those at issue in *Colville*. Moreover, in *Colville* this Court upheld Washington State's recordkeeping requirements solely because the Indian tribes involved failed to show that the requirements were not reasonably necessary. The lower court had imposed that burden of proof on Washington State. *See id.*

In determining the number of untaxed cigarettes to be allowed, the regulations rely in large part on the daily average consumption of cigarettes throughout New York State. *See* 20 NYCRR § 335.7(d)(2)(ii). The underlying premise is that daily average consumption of cigarettes in Indian territories is the same. The disparity in smoking rates between Indians and the public-at-large, however, has been reported in medical literature. *See, e.g., Cigarette Smoking Among American Indians, Alaskan Natives—Behavioral Risk Factor Surveillance System, 1987-1991*, 286 J. of Am. Med. Ass'n. 3052 (Dec. 2, 1992). If "probable demand" is limited to the overall New York average rate times the number of Indians in a given "trade territory," the number of untaxed cigarettes available almost certainly will not meet actual demand by Indian consumers. The regulations purport to account for any such differences by directing the Department of Taxation and Finance to "consider" information submitted by a given Indian nation or tribe or by a given Indian retailer. *See* 20 NYCRR § 335.7(d)(1), (d)(2)(i). There is no requirement, however, that the Department accept any such information. The Department has final authority to determine "probable demand" using the New York State average consumption rate, in addition to determining the "trade territory" and even the number of Indian consumers within that territory.[10]

[10] This problem is particularly significant to *amicus* Saint Regis Mohawk Tribe. The Tribe's territory straddles the border between the United States and Canada. Members of the Tribe reside on both sides of the border and travel freely between the two portions of the Tribe's lands. Specifically, thousands of members of the Tribe live in the Canadian portion of the territory. There is sig-

Finally, the regulations as applied would effectively usurp tribal authority over transactions occurring in Indian territories. As previouly noted, if the regulations are given effect, New York State alone will control the flow of untaxed cigarettes into Indian territories. At most, the Department of Taxation and Finance will "consult" with the Indian nation or tribe and then will determine probable demand within the trade territory. The Department will decide whether the number of untaxed cigarettes to be "agreed upon" between the nation or tribe and the Department in fact is reasonably related to that probable demand.

In these circumstances, the exercise of the Indian nation's or tribe's authority to approve each sale of untaxed cigarettes within its own territory will be reduced to informing each federally licensed Indian trader of its share of the "agreed upon" total number allowed by the Department. It is this aspect of New York's regulations that is most offensive to tribal sovereignty. If the Saint Regis Mohawk Tribe, or any other nation or tribe bordering New York State, chooses not to regulate cigarette sales on its own land pursuant to the State's regulations, then the Department of Taxation and Finance will dictate the number of untaxed cigarettes that can be purchased from federally licensed Indian traders, and will have veto power over each and every sale of untaxed cigarettes to Indian merchants on Indian land. If the tribe submits and agrees to regulate the distribution of untaxed cigarettes according to the State's rules, then the Tribe's role will be advisory at most. The Tribe's regulation of cigarette sales will require the imprimatur of the Department of Taxation and Finance in determining the number

nificant trade, including commerce in cigarettes, between the two portions of the Tribe's territory. There is no assurance, however, that New York's Department of Taxation and Finance will take into account the number of Saint Regis Mohawks who reside on the Canadian side in determining the number of untaxed cigarettes to be made available in the southern part of the Tribe's territory.

of untaxed cigarettes available and in reviewing each individual sale.

Moreover, the State's requirement that Indian nations or tribes and Indian retailers obtain "certificates" of tax exemption will vest the Department of Taxation and Finance with another layer of substantive control over commerce in cigarettes on Indian territory. Certification is another procedure in which Indians will be required to seek New York's imprimatur in order to be allowed to purchase untaxed cigarettes from federally licensed Indian traders and sell them to Indian consumers. That element of New York's tax scheme violates Indian tribal sovereignty and power to regulate commerce on Indian land.

Thus, the regulations vest New York with substantive control over commerce in cigarettes occurring on Indian territory. This complete usurpation of tribal authority offends those "notions of sovereignty . . . developed from historical traditions of tribal independence," that underlie any determination of whether state action is pre-empted by federal law. *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 145.

In summary, New York's regulatory regime, by purporting to regulate the most fundamental aspects of sales by federally licensed Indian traders to Indian customers in Indian territories, on its face conflicts with section 261 of the Indian trader laws, which by its terms governs these same aspects of cigarette sales by Indian traders. Moreover, there can be no doubt that the New York precollection regime would, in practice, impose significant additional burdens on the relationship between federally licensed Indian traders and their Indian customers, in derogation of tribal self-government. This Court should hold that, under *Warren Trading Post* and its progeny, New York's regulatory scheme is pre-empted by federal law.

II. THIS COURT'S DECISIONS IN *MOE, COLVILLE,* AND *POTAWATOMI* ARE INAPPOSITE.

The pre-emptive force of the Indian trader laws in cases involving state taxation of sales by federally licensed Indian traders who sell to Indian customers in their own territory is not altered by this Court's holdings in cases involving collection of state sales taxes by Indian merchants who make retail sales to non-Indian purchasers in Indian territory. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"); *Moe v. Confederated Salish & Kootenai Tribes, supra*, 425 U.S. 463 (1976) ("*Moe*"). Neither *Moe* nor *Colville* addressed the issue of whether federal law pre-empts a precollection regime imposed on sales between federally licensed Indian traders and their Indian customers on Indian territory.

Moe involved application of Montana's direct tax on retail consumers of cigarettes, which retailers were required to collect. 425 U.S. at 482. The Court held that "[t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden" that neither "frustrates tribal self-government" nor "runs afoul of any congressional enactment dealing with the affairs of reservation Indians." 425 U.S. at 483. In *Moe*, the Court noted that *Warren Trading Post* "does not apply," distinguishing the cases on their facts. 425 U.S. at 482.

Colville involved Washington State's tax on "the sale, use, consumption, handling, possession or distribution" of cigarettes, the legal incidence of which was on "the purchaser in transactions between an Indian seller and a non-Indian buyer." 447 U.S. at 141-42. The Court relied on *Moe* to conclude that "the State may validly require the tribal smokeshops to affix stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe." 447 U.S. at 159. In *Colville*, the Indian merchants involved

were licensed federal Indian traders, as were their non-Indian wholesale suppliers. 447 U.S. at 144. However, the Court carefully pinpointed the distinction between Indian retailers selling to non-Indians versus federally licensed Indian traders selling to Indians:

> The Indian trader statutes, 25 U.S.C. § 261 *et seq.* incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, *see Warren Trading Post Company v. Arizona Tax Comm'n*, 380 U.S. 686 (1965), but no similar intent is evident with respect to sales made by Indians to non-members of the Tribe.

447 U.S. at 155-56. The status of the Indian retailers as federally licensed Indian traders was irrelevant, therefore, to the holding in *Colville*. That issue was not mentioned at all in *Moe*.

The transactions at issue in *Moe* and *Colville* were retail sales by Indian-owned enterprises to non-Indians (or to non-member Indians). The taxes at issue in those cases were sales/use taxes that were imposed directly on retail transactions, to be paid by the non-Indian customers and collected by the Indian retailers. *Moe* and *Colville* hinge on "tribal sovereignty," deference to which does not oust the "minimal burden" of a state's requirement that Indian merchants collect tax on sales to non-Indian customers. *Warren Trading Post*, by contrast, rests on the pre-emptive effect of the federal Indian trader laws. Respondents are correct in stating that petitioners' reliance on *Moe* and *Colville* to weaken, narrow, or limit the pre-emptive effect of the federal Indian trader laws, as explained in *Warren Trading Post* and its progeny, is misplaced.[11]

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[11] As noted, the holdings in *Moe* and *Colville* make no mention of the federal Indian trader laws. Despite the clear statements in *Moe* and *Colville* distinguishing each case from *Warren Trading Post*, the two lines of cases can be confused. Non-Indian wholesalers who are licensed Indian traders, such as respondents in this

Finally, petitioners' reliance on certain *dictum* in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), is similarly misplaced. In that case, the Court held that tribal sovereign immunity bars states from attempting to collect from Indian nations or tribes state taxes payable on retail sales to non-Indians in Indian territory. The Court ventured, however, that "[s]tates may of course collect the sales tax from cigarette wholesalers . . . by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514. It should be noted that neither *Potawatomi*, nor the only authority cited for this proposition, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990), even mentions the federal Indian trader laws. Accordingly, *Potawatomi* is not authority on the question of whether federal law pre-empts New York's tax regulations.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the New York State Court of Appeals.

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case, come under *Warren Trading Post*. This Court should decline petitioners' invitation to blur these two separate lines of cases.

(19)

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OCTOBER TERM, 1993

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Petitioners,

against

MILHELM ATTEA & BROS. INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation
and Finance of the State of New York, *et al.*,

Petitioners,

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ELIAS H. ATTEA, JR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF THE RESPONDENTS

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No. 93-377

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On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF AMICUS CURIAE THE ONEIDA INDIAN NATION OF NEW YORK IN SUPPORT OF THE RESPONDENTS

The Oneida Indian Nation of New York submits this brief as an *amicus curiae* in support of the Respondents, Milhelm Attea & Bros., Inc. and Elias Attea, Jr., pursuant to letters of permission from counsel for the parties, filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Oneida Indian Nation of New York (the "Oneida Nation") is a federally recognized Indian nation located in central New York State. 53 Fed. Reg. 52829, 52831 (1988). The Oneida Nation is one of the Indian nations affected by the New York State Indian Cigarette Tax Regulations. The Oneida Nation operates a smokeshop and has purchased cigarettes from one of the Respondent cigarette wholesalers, Milhelm Attea & Bros., Inc.

The Indian trader statutes are a necessary bulwark against state interference with tribal sovereignty, and are important now more than ever. If the Court weakens its Indian trader preemption rulings at the request of the State of New York, it will invite state interference with tribal commerce and erode tribal autonomy. Consequently, the Oneida Indian Nation believes that the Court's decision in this case has ramifications beyond the narrow issue of cigarette taxes.

The Oneida Nation, like many Indian tribes, is engaged in significant economic and commercial activity. Such development necessarily requires trade and contracts with non-Indians. If a state can target the non-Indian side of a tribe's economic relationships and impose special regulations, that state can effectively regulate every aspect of Indian activity. The problem is particularly acute because, by virtue of federal law and inherent sovereignty, Indians frequently have market advantages that states and their non-Indian citizens wish to restrict or eliminate. If states are permitted to regulate businesses that sell goods to Indians, states will be able to use that power to interfere with tribal economic development and thus tribal self-government. As the Oneida Nation and other Indians diversify their economic activities, the opportunities and temptations for state interference by regulation of Indian traders will grow.

SUMMARY OF ARGUMENT

1. The New York State Indian Cigarette Tax Regulations specifically target Indian traders and regulate the price, quantity and kind of goods sold. The federal Indian trader statutes, however, explicitly reserve to the federal government "the sole power and authority" to regulate the "price," "quantity," and "kind" of goods sold to Indians. 25 U.S.C. § 261. These statutory terms constitute an express federal preemption of state regulation of Indian traders and embody a Congressional intent to protect Indian tribes from state interference. The State argues for an exception to Indian trader preemption, urging a balancing approach that would permit the imposition of "minimal burdens" on Indian traders. The Court never has applied a balancing or minimal burdens analysis where, as here, preemption is mandated by express statutory language. A bright-line rule of preemption is compelled by the clear language of Section 261 and is necessary to fulfill the Congressional purpose of protecting tribes against state interference through the regulation of Indian traders.

2. The State argues that this Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), authorizes the regulations at issue. In *Potawatomi*, however, the Court merely suggested that a State could enforce its laws of general application against Indian traders. The State's regulations here are not laws of general application but, rather, a complex regulatory scheme targeting only Indian traders. The Indian commerce clause, U.S. Const., Art I, § 8, cl. 3, standing alone might prohibit this type of discrimination against Indian traders. However, since Congress has acted in this sphere, it is not necessary for the Court to reach that issue. The Court should hold that the Indian trader statutes, read in tandem with the Indian commerce clause, prohibit the discrimination against Indian traders embodied in the New York State Indian Cigarette Tax Regulations.

ARGUMENT

THE NEW YORK INDIAN CIGARETTE TAX REGULATIONS ARE PREEMPTED BY THE FEDERAL INDIAN TRADER STATUTES.

Section 261 of the federal Indian trader statutes provides that the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make . . . rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to Indians." Act of August 15, 1876, c. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261. All persons desiring to trade with Indians are subject to the Commissioner's authority. 25 U.S.C. §§ 261, 262; *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980). Pursuant to the federal Indian trader laws, 25 U.S.C. §§ 261-264, the Bureau of Indian Affairs has promulgated regulations governing Indian traders, currently published at 25 C.F.R. § 140 (1993).

The Court has twice held that the Indian trader statutes and regulations thereunder occupy the field of sales to Indian tribes, and "no room remains for state laws imposing additional burdens upon traders." *Central Machinery*, 448 U.S. at 163-64; *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 690 (1965). In *Warren Trading Post*, the Court concluded that Congress intended that "no burden shall be imposed upon Indian traders for trading with reservation Indians except as authorized by Acts of Congress or by valid regulations promulgated under those Acts," 380 U.S. at 691, and that Arizona could not apply a gross proceeds tax to a retailer selling goods to reservation Indians. 380 U.S. at 685-86. In *Central Machinery*, the Court held that Arizona could not apply a transactions privilege tax to a company selling tractors to reservation Indians. 448 U.S. at 161.

Notwithstanding these principles, the New York State Indian Cigarette Tax Regulations are targeted directly and solely against Indian traders and tribes. 20 NYCRR § 335.6(b). The regulations control the quantity of untaxed cigarettes that can be sold to Indian tribes, and even authorize State officials to entirely prohibit sales of untaxed cigarettes to the tribes. 20 NYCRR §§ 335.7(c)&(d), 335.6(d)(3). In order to save these regulations, the State of New York invites the Court to overrule its holding in *Central Machinery*, urging the application of a "minimal burdens" standard borrowed from cases in which no federal statute was controlling.

The Court should decline that invitation. Congress has already balanced federal, state and tribal interests and has determined that states should be banned from regulating Indian traders, regardless of the burden imposed. With regard to the Indian trader statutes, Congress intended preemption to be an end in itself.

A. Indian trader preemption prevents state interference with tribal self-government and economic development.

1. *Congress intended the Indian trader statutes to protect the Indians from the states.*

From the very beginning, it has been an important function of federal law to "regulate and protect the Indians and their property against interference even by a state." *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Of the many federal interests in maintaining exclusive federal regulation of Indian tribes, the protection of Indian tribes against local interests and state control is distinct and compelling.

Federal preemption of state law concerning Indians was of paramount importance to the first Congress, which enacted in

1790 the antecedent to the current Indian trader laws. Act of July 22, 1790, § 1, 1 Stat. 137; *Warren*, 380 U.S. at 688. The first Congress legislated pursuant to the new Constitution and its Indian commerce clause, U.S. Const. Art. I, § 8, cl. 3, which had been written to close the loopholes in the Articles of Confederation permitting state regulation of Indian commerce. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 & n.4 (1985) (citing The Federalist No. 42 at 284 (J. Cooke, ed. 1961)). Chief Justice Marshall noted in *Worcester v. Georgia* that the goal of federal preemption was embodied in the antecedent to Section 261 enacted on March 30, 1802, and that "[t]he treaties and laws of the United States . . . provide that all intercourse with [the Indians] shall be carried on exclusively by the government of the union." 31 U.S. (6 Pet.) 515, 557 (1832).

The goal of federal preemption was still paramount when Section 261 was enacted in 1876. In that year, the Court heard a challenge to a seizure of whiskey by federal authorities, pursuant to the 1834 antecedent to the current Indian trader laws. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195-196 (1876). Holding that the whiskey could be seized, the Court noted that the Indian trader laws embodied the notion that "Congress now has the exclusive and absolute power to regulate commerce with Indian tribes" and "the only efficient way of dealing with the Indian tribes was to place them under the protection of the general government." 93 U.S. at 194.

The principle of federal protection against the states was reiterated by the Court ten years later in *United States v. Kagama*, which upheld federal criminal jurisdiction over Indian country. 118 U.S. 375 (1886). The Court identified a "duty of protection" on the part of the federal government, noting that Indians "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. at 384-85.

2. *Protection from state interference remains important today.*

Federal protection of Indian tribes from state interference remains important. Only the federal government is charged with a "unique trust relationship" with the tribes. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The states do not have this trust relationship, and do not have the fiduciary obligations that control federal dealings with the tribes. *See Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The states, in regulating trade with tribes, are also much more likely than the federal government to serve local, non-Indian commercial interests. They are also more likely to express the hostility of non-Indians who resent the economic advantages and political independence enjoyed by Indians.

Indians enjoy many privileges pursuant to federal law of which their non-Indian neighbors are likely to be jealous. These exemptions are not evils to be eradicated; they are benefits to Indian tribes arising from federally protected Indian sovereignty or from a federal policy to promote Indian welfare. For example, Indians are permitted to fish and hunt in ways forbidden to non-Indians. *See, e.g., Lac Du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1253 (7th Cir. 1993). Indians are exempt from state regulatory policies, such as gaming restrictions, to which non-Indians are subject. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987); Indian Gaming Regulatory Act, Oct. 17, 1988, Pub.L. 100-497, § 2, 102 Stat. 2467, 25 U.S.C. § 2701, *et seq.* Reservation land may not be subject to local zoning. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 444 (1989). States may not condition access to courts on a waiver of tribal sovereign immunity. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986).

If permitted to regulate Indian traders, states can dilute these privileges by imposing restrictions on those who do business with the tribes. For example, absent Indian trader preemption, states might require Indian traders to obtain a waiver of sovereign immunity in contracts with tribes, either for the benefit of the trader alone or the state government as well. Alternatively, sales of goods used in a particular Indian trade, whether spearfishing or high-tech manufacturing, could be taxed or otherwise regulated ultimately to affect a tribe's access to or use of goods in commerce. Sales and contracts could also be regulated to achieve practical control over tribal activity.

The State's regulations here are a good example of this danger. They authorize the State to embargo sales of untaxed cigarettes to selected tribes, 20 NYCRR §§ 335.6(d)(3) and 335.7(d)(6), although the Court has held that the Indians have a right, under principles of tribal sovereignty, to sell cigarettes to Indians without collecting the tax. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480 (1976).[1]

Recent regulatory developments highlight the continuing importance of the Indian trader statutes in promoting tribal self-government and economic development while preventing state interference. On April 25, 1980, the Bureau of Indian Affairs (the "BIA") proposed that the Indian trader regulations be restricted to businesses located in isolated communities where there is an absence of competition. 46 Fed. Reg. 1298 (1981). That proposal was abandoned because most comments received were strongly opposed, "both because Indian reservation consumers need the protection of the federal government and because the failure of the federal government to regulate could result in permitting more state taxation of transactions involving Indians on Indian reservations." *Id.* Thus, the federal government actively chose in 1981 to continue to occupy the field of Indian trader regulation, responding to fears of state incursions into the area.

[1] The burdens imposed on tribes by the New York State Indian Cigarette Tax Regulations violate the right of the tribes to "make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), are not authorized by 25 U.S.C. §§ 232 & 233 (granting civil and criminal jurisdiction to New York State), and are impermissible under the Court's "minimal burdens" test applied in *Moe*. However, since the regulations have been challenged under the Indian trader statutes, rather than the tribal sovereignty doctrine, we will not address those issues here.

The BIA then proposed that it "modernize the trading regulations by adopting as its regulations the consumer protection statutes of the state where the business is located." *Id.* That proposal was considered for a number of years but does not appear in the Federal Register after the Department's Semiannual Agenda in October 29, 1985. 50 Fed. Reg. 44242 (1985). The proposal, which presumably was abandoned, highlights the Executive's understanding that state laws do not apply to Indian trader transactions absent federal incorporation. The abandonment of the proposal is significant because it shows that the Executive is not inclined to surrender control over Indian trading to the States.[2]

Recently, a similar suggestion that the Indian trader regulations be repealed was proposed and, judging by its disappearance from the Department's Semiannual Agenda six months later, quickly abandoned. *Compare* Semiannual Agenda, 58 Fed. Reg. 24442, 24490 (1993) *with* Semiannual Agenda, 58 Fed. Reg. 56456, 56502 (1993). Instead, the BIA proposes to lend New York tribes the authority of the United States to enforce tribal commercial codes against Indian traders. Semiannual Agenda, 58 Fed. Reg. 56456, 56502 (1993).

These developments show that the federal government continues to use the Indian trader statutes to encourage the tribes, in partnership with the federal government, to develop politically and economically while insulated from state interference.

[2] Also during the period since *Central Machinery*, the BIA enacted new regulations governing federal government employees trading with Indians. 49 Fed. Reg. 25433 (1984).

3. *Indian trader preemption is a valuable bright-line rule.*

Indian trader preemption creates a well-settled, bright-line rule that protects Indian autonomy against state incursions. The New York Court of Appeals accepted this. *Milhelm Attea & Bros., Inc. v. Dep't of Taxation and Finance*, 81 N.Y.2d 417, 427, 615 N.E.2d 994, 998, 599 N.Y.S.2d 510, 514 (1993) (adhering to "established law regarding Federal preemption"). Any weakening of Indian trader preemption will encourage aggressive state regulation of Indian traders and engender a new round of the type of "case-by-case litigation which has plagued this area of the law for a number of years." *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting). By contrast, if the Court adheres to a bright line of Indian trader preemption, it will "encourage[] settled expectations and, in doing so, foster[] investment by businesses and individuals." *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1915 (1992) (upholding rule that a state may not impose sales and use taxes on mail order sales).

The longstanding goal of federal Indian policy, reflected in statutes, is to "promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The Court has consistently applied this policy when considering questions of federal preemption. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The more success the tribes enjoy in achieving economic development, the greater the temptations and opportunities for state interference by regulation of those with whom the tribes do business. As tribes develop, they necessarily must be involved with non-Indians to pursue economic activities, so that the ability of states to regulate non-Indians who deal with

tribes ultimately is the ability to regulate tribal development itself.

Tribes already are engaged in a wide variety of economic activity other than selling cigarettes and gaming. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 806 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993) (tribe manufactured military supplies and sought to expand into medical products); David Owen, *Indians Dealing on New Terms*, The Financial Times, April 14, 1987 at 6 (describing diversity of Cherokee businesses with $9 million annual payroll). Indian tribes will increasingly use some of their $6 billion annual gaming revenue, earned pursuant to federal law, to diversify into the full spectrum of economic activity. *See* Sharon Henry, *Multiplying Indian Casinos Draw Critics' Fire*, Christian Science Monitor, August 2, 1993 at 12 ($6 billion in tribal gaming revenue). Indian trader preemption allows the tribes to pursue the federal policy goals of tribal economic growth and diversification, free from state interference through the economic back door of Indian trader regulation.

B. The New York State Indian Cigarette Tax Regulations are preempted under conventional preemption analysis because of the explicit language of Section 261.

The New York State Indian Cigarette Tax Regulations are preempted without reference to special principles of Indian sovereignty, or even to the scope and purpose of the federal regulatory scheme. The regulations are invalid under the plain language of Section 261.

State law can be preempted either because of explicit language in a statute or because the structure and purpose of a statute implies a Congressional intent to occupy the field. *Cippolone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). In *Warren* and *Central Machinery*, the state taxes at issue were not explicitly preempted by the Indian trader statutes. Never-

theless, the Court held that the structure and scope of the statutes showed that Congress intended to preempt the field, and therefore the taxes. *Warren*, 380 U.S. at 691; *Central Machinery*, 448 U.S. at 163-64. In this case, preemption is even more manifest, since the text of Section 261 directly expresses the Congressional intent to displace state regulations of the "kind," "quantity" and "price" of goods sold to Indians:

> The Commissioner of Indian Affairs *shall have the sole power and authority* to . . . make such rules and regulations . . . specifying the *kind and quantity of goods and the prices at which such goods shall be sold to Indians*.

25 U.S.C. § 261 (emphasis added).

The New York State Indian Cigarette Tax Regulations require state officials to determine the quantity of cigarettes that can be sold to Indians at untaxed prices, 20 NYCRR § 335.7(c)&(d), and empower the State to block an Indian tribe's access to all untaxed cigarettes if State officials believe the regulations or the general tax laws have been violated. 20 NYCRR §§ 335.6(d)(3) & 335.7(d)(6). The State is thus setting quotas on the amount of untaxed cigarettes the Indians can receive, and reserving the right to set the quota at zero. The imposition of the targeted tax on Indian traders inevitably increases the price of cigarettes sold to Indians. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 92 (1963) (state regulations preempted because of indirect effect on natural gas prices); *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board*, 474 U.S. 409, 420 (1986) (explaining *Northern Natural Gas*). These are exactly the type of price, kind, and quantity regulations explicitly reserved to the "sole power and authority" of the Commissioner by the statute. *See, e.g.*, 25 C.F.R. § 140.17 (prohibiting the sale of cigarettes to minors).

When the language of a federal statute grants "sole power and authority" to a federal official over a particular subject

matter, there is no room for state regulation on the same subject. The precise phrase "sole power" has been quoted extensively from ERISA's legislative history to support that statute's blanket preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting 120 Cong. Rec. 29197 (1974): ERISA reserves "to Federal authority the sole power to regulate the field of employee benefit plans."). Reference to "exclusive" federal "power" and "authority" as to warehouse licensing also has been held to preempt all state regulation of federally licensed warehousemen on subject matters addressed by federal law. *Rice v. Santa Fe*, 331 U.S. 218, 236 (1947). There is no reason to believe that the phrase "sole power" has any less preemptive force here than elsewhere. The conclusion of federal preemption, without reference to special principles of Indian law or even to the scope and purpose of the Indian trader regulatory scheme, is inescapable.

C. The State's "minimal burdens" standard has no place where, as here, express statutory language resolves the question.

The State essentially concedes that the federal Indian trader statutes preempt state law generally. However, the State believes that because states may require Indian tribes to collect cigarette taxes from non-Indian customers, New York may require Indian traders to collect the taxes from Indians. Petitioner's Brief at 19. The State argues that the balancing test applied in this Court's opinions in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976), and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 159-62 (1980), should be applied here, and the State tax regulations upheld because they impose only "minimal burdens" on Indian traders. Petitioner's Brief at 21-22. This argument seeks to carve an exception from Indian trader preemption that cannot be found in any of this Court's opinions or in the Indian trader statutes themselves.

Even in the often complex area of federal Indian law, the preemption inquiry remains at bottom a question of statutory construction. *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). The State's balancing approach and "minimal burdens" test never have been used when preemption can be determined from a statute's terms. The State relies upon the three-part balancing of "federal, state, and tribal interests" that is the hallmark of the tribal sovereignty doctrine. *See Rehner*, 463 U.S. at 720. That balancing test, however, should only be applied in the presence of "vague or ambiguous federal enactments." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The balancing is a mechanism by which "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 144. Contrary to the suggestion of the State, the balancing test has no role to play when Congress's preemptive intent is otherwise clear. "[A] State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

The very cases cited by the State show that the "minimal burdens" test cannot be applied where, as here, a question is resolved by conventional preemption analysis. In *Moe*, the relevant statutes and treaties did not refer to the State's power to tax. 425 U.S. 475-77. When considering whether the State could require Indians to collect cigarette taxes from non-Indians, in the absence of a governing statute, the Court asked whether the "minimal burden" of requiring Indians to collect sales taxes from non-Indians would frustrate tribal sovereignty as articulated in *Williams v. Lee*, 358 U.S. 217, 219-20 (1959). *Moe*, 425 U.S. at 483. The Court explicitly distinguished the case of Indian traders selling to reservation Indians, because that situation was governed by a federal statute. 425 U.S. at 482.

In *Colville*, the Court was left with similarly ambiguous federal law when considering whether tribal sales taxes affected the State's power to tax reservation sales to non-Indians. 447 U.S. at 156. The Court again explicitly distinguished the situation from that of Indian traders. *Colville*, 447 U.S. at 155-56. Lacking a federal statute on point, the Court had no choice but to apply the "minimal burdens" test derived from the tribal sovereignty doctrine. 447 U.S. at 159-60. Thus, the "minimal burdens" test applied in *Moe* and *Colville* to sales by Indians to non-Indians is simply irrelevant here, where a statute expressly preempts state regulation of sales to Indians.

D. The New York State Indian Cigarette Tax Regulations are preempted because they discriminate against Indian traders.

The Court's opinion in *Potawatomi* suggests that laws of general application can be enforced against Indian traders to collect cigarette taxes. Even if that is so, the regulations here are invalid because they facially discriminate against Indian traders. The Indian commerce clause commits regulation of Indian traders to the special purview of Congress. U.S. Const., Art. I, § 8, cl. 3. Congress has acted pursuant to the Constitution by enacting the Indian trader statutes. Whatever the preemptive effect of the Indian commerce clause or the Indian trader statutes when read separately, the two read together prohibit state discrimination against the objects of federal regulation, i.e. Indian traders. *See Hines v. Davidowitz*, 312 U.S. 52, 62-66 (1941).

The State takes heart from the Court's suggestion in *Potawatomi* that a State can collect its taxes on sales by Indians to non-Indians by "assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). In *Potawatomi*, the Court was referring to *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122, 124 (10th Cir.), *cert. denied*, 498 U.S. 823 (1990). 498 U.S. at 514.

In that case, Oklahoma sued an Indian trader for non-payment of taxes on cigarettes that the State claimed had already been sold to non-Indians. *City Vending*, 898 F.2d at 124. The State's lawsuit in *City Vending* sought only to enforce laws of general application to collect taxes on sales made ultimately to non-Indians. In such circumstances, the State's lawsuit may be permissible because it is arguably not regulating the Indian trader *qua* Indian trader, although this question should be left for resolution in an appropriate case.

Here, by contrast, the New York State Indian Cigarette Tax Regulations target only Indian traders and tribes. The regulations presume that sales to Indian nations exceeding each nation's quota — as set by the State — are taxable sales. There is no requirement, as in a lawsuit, that the State prove untaxed sales have been made to non-Indians. Enforcement is simply left to the judgment of the State bureaucracy. The regulations contain no procedural protections, such as hearings, burdens of proof, and rights to present evidence, to control when and how State officials determine that Indian traders and tribes have sold too many untaxed cigarettes or should be banned from selling any at all.

The regulations thus discriminate against Indian traders by subjecting them, because they are Indian traders, to a special administrative scheme. The State's scheme includes a presumption of misconduct and deprivation of procedural protections that Indian traders would enjoy if regulated only through the State's laws of general application. It is this means of enforcement — facially discriminatory regulation of Indian traders — that is inconsistent with the Indian trader statutes, interpreted in light of the Indian commerce clause.

The Indian commerce clause, U.S. Const., Art. I, § 8, cl. 3, "vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *see Oneida Indian Nation*

v. County of Oneida, 414 U.S. 661, 670 (1974); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). The limitations on state power created by the Indian commerce clause have never been spelled out, since the Court has resolved challenges to state regulation by reference to federal statutes. *See, e.g., Warren*, 380 U.S. at 686. In *Colville*, however, the Court stated that the clause may have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce." 447 U.S. at 157; *see also Colville*, 447 U.S. at 177 (Rehnquist, J., concurring and dissenting).[3] The Court should here find that Congress' legislation in an area constitutionally committed to its expertise, "conjoined with the Indian commerce clause," *Colville*, 447 U.S. at 175 (Stewart, J., concurring and dissenting), prohibits state discrimination against Indian traders.

In *Hines v. Davidowitz*, the Court rejected state regulation of resident aliens, holding that the "legal imposition of distinct, unusual and extraordinary burdens and obligations" by a state on a class of persons committed to the special protection of Congress violates the Supremacy Clause. *Hines v. Davidowitz*, 312 U.S. 52, 65-66 (1941). In *Hines*, Pennsylvania had enacted an Alien Registration Act. 312 U.S. at 62. Congress had also enacted a federal Alien Registration Act, but without express preemptive language. 312 U.S. at 60. The Court found that tradition and the Constitution had committed the regulation of resident aliens to the special province of Congress. 312 U.S. at

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[3] The prohibition on discrimination is familiar from the Interstate commerce clause, which prohibits discrimination against interstate commerce even when the state is pursuing an otherwise legitimate goal. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *Toomer v. Witsell*, 334 U.S. 385, 406 (1948). Discrimination is also a touchstone of the protection of federal instrumentalities against state power. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 487 (1960).

62-65. Writing with respect to the regulation of aliens, the Court could have been describing the regulation of Indians, stating that it is "one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . . ." 312 U.S. at 68.

The Court held in *Hines* that because resident aliens were committed to the special care of Congress, and Congress had acted, state laws discriminating against resident aliens were preempted. 312 U.S. at 74. As in *Hines*, the Court here is charged with determining the preemptive scope of a federal statute enacted in an area constitutionally committed to Congress, and the Court should hold that State discrimination against Indian traders, like State discrimination against resident aliens, is forbidden.

The State has not attempted to justify its discrimination, other than by referring to difficulties in collection of its tax. New York State's discriminatory tax regulations cannot be upheld "simply because they facilitate in some measure enforcement of a valid tax." *Toomer v. Witsell*, 334 U.S. 385, 406 (1948). In *Toomer v. Witsell*, the Court considered a commerce clause challenge to a South Carolina regulation requiring all boats shrimping off the coast of that State to clean, pack and stamp (with a shrimp tax stamp) their catch in South Carolina. 334 U.S. at 403. The Court found the regulation invalid because it discriminated against shrimpers who preferred to take their catch directly out of the State, even though the regulation made it much easier for the State to collect its otherwise valid shrimp tax. 334 U.S. at 406. "[T]he problem in this case is not as to the existence or even the scope of a State's power to [tax cigarettes ultimately sold to non-Indians]; the problem is only whether the Constitution sanctions the particular means chosen by [New York] to exercise the conceded power . . . ." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 93 (1963).

If New York State finds that it cannot collect cigarette taxes without running afoul of federal law, it "may of course seek appropriate legislation from Congress," *Potawatomi*, 498 U.S. at 514, or regulations from the Bureau of Indian Affairs under the Indian trader statutes. This Court is simply not the proper forum in which to solve the State's problem.

CONCLUSION

For the reasons stated, the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, et al.,

Petitioners,

v.

MILHELM ATTEA & BROS. INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York, et al.,

Petitioners,

v.

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

On Writ Of Certiorari To The Court of Appeals Of The State Of New York

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.* IN SUPPORT OF RESPONDENTS

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No. 93-377

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, et al.,

Petitioners,

v.

MILHELM ATTEA & BROS. INC., et al.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York, et al.,

Petitioners,

v.

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

On Writ Of Certiorari To The Court of Appeals Of The State Of New York

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are thirteen federally recognized Indian tribes and one national Indian organization.[2] *Amici* have a substantial interest in issues regarding sales of cigarettes in Indian country. Some *Amici* tribes sell cigarettes to non-tribal members and to members in Indian country, in their convenience stores and in conjunction with other tribal businesses. All *Amici* tribes exercise their sovereign jurisdiction over cigarette sales and other commercial activities in Indian country. They do so under this Court's cases and under other federal law confirming their sovereignty, including their sovereign right to be free from state jurisdiction in Indian country.

The State of New York (hereinafter "the State") here seeks to enforce quotas on the number of untaxed cigarettes that may be sold to tribal members in Indian country. The State also presumes to regulate how and where these sales will occur and how and where such purchases may be used. The paramount issue in this case then is whether a state can regulate cigarette sales to tribal members in Indian country. *Amici* strenuously urge this Court

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[1] Counsel for Petitioner does not object and Counsel for Respondents consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

[2] The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

to reject the State's backhanded attempt to regulate such sales.

Several *Amici* supporting the State in this case broadly assert or imply that Indian retailers are not abiding by their obligations under federal law to collect and remit valid state taxes on cigarette sales to non-tribal members, and that Indians are engaged in widespread marketing of naked cigarette tax exemptions to non-members in Indian country. *Amici* urge this Court, in fashioning its opinion in this case, to consider that many tribes have enacted regulations or entered into agreements with states addressing cigarette tax collection in Indian country, and that sales of cigarettes in Indian country to non-members increasingly occur in the context of value generated on the reservation and in conjunction with the provision of services to non-members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, wholesale distributors who supply cigarettes to Indian retailers on reservations located in New York challenge the State's cigarette tax laws and regulations. The New York Court of Appeals held the laws and regulations invalid under federal law. The court distinguished the laws and regulations here from those involved in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) on the grounds that the State assesses its cigarette taxes on wholesalers, not retailers. The court then held that the rule of *Warren Trading Post Co. v.*

Arizona Tax Comm'n, 380 U.S. 685 (1965), that federal law has completely preempted state regulation of reservation Indian trade, applied in this case rather than *Moe* and its progeny. Alternatively, the court found the laws and regulations impose undue burdens on the wholesalers.

The New York Court of Appeals reached the correct result, at least with respect to regulation of sales of cigarettes to tribal members, though it failed to note the most compelling reason for that result. The thrust of the state laws and regulations is twofold. The laws assess wholesalers for taxes imposed on retail cigarette sales, including sales on Indian reservations to non-tribal members.[3] The regulations regulate on-reservation sales of untaxed cigarettes to tribal members. They do this by dictating how and where tribal Indians can sell, purchase, and use untaxed cigarettes. In this sense the state regulations are unlike any heretofore examined by this Court.

In Part I of this Brief *Amici* address the State's regulation of sales of cigarettes to tribal members in Indian country. We show how that regulation is preempted by federal law and infringes on tribal self-government.

In Parts II and III we address the analytical approach this Court should adopt in determining whether and how a state may enforce its taxes on cigarette sales to non-members in Indian country in two situations involving tribal interests not presented by the facts of *Moe* and *Colville*.

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[3] *Amici* do not address the issue of the State's right to assess wholesalers for taxes imposed on retail sales of cigarettes to non-tribal members in Indian country.

The first situation involves tribal efforts to comply with the holdings in *Moe* and *Colville* that tribes must assist in enforcing valid state taxes on cigarette sales to non-members. We urge this Court to adopt the principle that the existence of tribal laws or tribal-state compacts which address collection and remittance of the state taxes overcomes the presumption that a state enforcement scheme is necessary to prevent tax evasion, and shifts the burden to the state to show that the tribal enforcement scheme is ineffective.

The second situation focuses on the nature of the cigarette sales and involves instances where the sales to non-members are an incidental aspect of a larger on-reservation tribal economic enterprise involving provision of services to non-members. In such situations, we urge the Court to adopt the principle that the state's interest in taxing non-member sales is outweighed by tribal and federal interests and therefore state taxes may not be imposed on such sales.

ARGUMENT

I. THE STATE CIGARETTE TAX REGULATIONS IN THIS CASE ARE INVALID UNDER FEDERAL LAW AT LEAST TO THE EXTENT THEY RESTRICT SALES OF UNTAXED CIGARETTES TO TRIBAL MEMBERS IN INDIAN COUNTRY

The State here comprehensively and unlawfully regulates sales of cigarettes to tribal members in Indian country at the retail and consumer levels. It prescribes how many untaxed cigarettes can be sold to Indian retailers on

their reservations, where the retailers must take delivery of these cigarettes, how the tribal members must use the untaxed cigarettes they buy, and where they must use them.

The State incorrectly frames the issue regarding these regulations as whether they are "minimal burdens" designed to assist in the collection of valid state taxes on reservation sales of cigarettes to non-tribal members. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) sanctioned the imposition of minimal burdens by states on tribes which were reasonably necessary to prevent fraud in cigarette sales to non-members. In *Colville*, for example, state regulations requiring tribes and Indian retailers to keep records of the numerical and dollar amounts of sales they made to non-tribal members and to tribal members were upheld. 447 U.S. at 160.

However, no attempt was made by states in those cases to restrict the number of untaxed cigarettes which could be sold to tribal members. This distinction is critical. The minimal burden test should not be applied to determine the validity of direct state regulation of sales to members. Rather, such regulation is invalid because it is preempted by federal law and infringes on tribal self-government.

A. State Regulation Of Cigarette Sales To Tribal Members In Indian Country Is Preempted By The Indian Traders Statutes And By The Compelling Federal And Tribal Interests In Tribal Self-Government And Economic Development

The State here sets a quota on the number of untaxed cigarettes which Indian retailers may purchase for resale on their reservations. 20 NYCRR §§ 335.7(b), 335.7(c), and 335.7(d). Indian retailers are prohibited from purchasing, selling, or possessing untaxed cigarettes beyond the quota. *Id.* at § 335.7(e); *see also* New York Tax Law §§ 481, 1814, 1846, and 1847 (proscribing civil and criminal penalties for unlawful possession of untaxed cigarettes). The State readily admits it limits "the amount of tax free product which may be purchased by the tribal retailers. . . . " State's Op. Br. at 24.

The quota is based on an amount "reasonably related to the probable demand" for cigarettes by tribal members on a reservation. 20 NYCRR § 335.7(d)(1). Probable demand is determined in one of two ways. *Id.* at § 335.7(d)(2). The State must consult with tribes that regulate, license, or control the sale and distribution of cigarettes within their reservations regarding evidence the tribes may submit to such probable demand, including sales records, consumption records, tribal enrollment records, and other statistical evidence. *Id.* at § 335.7(d)(2)(i). In the absence of tribal regulation or evidence, the State will calculate the probable demand "based on the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe. . . . " *Id.* at

§ 335.7(d)(2)(ii); *see also* State's Op. Br. at 19 (probable demand is "an amount no greater than the maximum legitimate Indian consumption of the reservation").

Wholesalers and Indian retailers must register with the State to purchase untaxed cigarettes. 20 NYCRR §§ 335.6(b)(4) and 335.6(f). Prior approval of the State or regulating tribe is required for each sale or delivery of untaxed cigarettes. *Id.* at § 335.7(c). The quota system is implemented through a "coupon system" imposed on wholesalers and Indian retailers. *See* Notice to Registered Distributors of Motor Fuel, Diesel Motor Fuel and Licensed Cigarette Agents Regarding Sales of Tax-Free Product on Indian Reservations, N-88-53, New York State Department of Taxation and Finance, *reprinted in* the Joint Appendix in this case at 44a-50a.

The State issues monthly, to all registered wholesalers and Indian retailers, an allotment of coupons (each coupon represents 400 packages of cigarettes) based on the quotas of untaxed cigarettes for each reservation.[4] Coupons are among the sales records which wholesalers

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[4] The regulations set the quota on a reservation-wide basis, but do not explain how that quota is to be shared among wholesalers or Indian retailers where there are more than one dealing with or operating on a reservation. Likewise, Notice N-88-53 provides that "[t]he reservation allotment of tax-free product will . . . be allocated among the registered dealers located on that reservation by means of a tax exemption coupon," but fails to explain how. It is reasonable, however, to presume that the State has some means of addressing the division of the quota among reservation retailers. Such action intensifies the state intrusion into the federally preempted field of regulating sales to tribal members.

and Indian retailers must complete and remit to the State. Untaxed cigarette purchases by the retailers must be made according to the coupons which specify the dealer, location of delivery, and numerical amount of cigarettes which may be delivered/purchased. Notice N-88-53; *see also* State's Op. Br. at 12-13 and 22-23.

As purchasers and consumers of untaxed cigarettes, tribal members are also regulated. They may buy untaxed cigarettes only "within the boundaries of a qualified reservation for [their] own use or consumption (i.e. other than for resale) within such reservation." 20 NYCRR § 335.6(b)(1)(ii); *accord* § 335.6(e)(1) (tribal members may purchase untaxed cigarettes only if they take delivery of the cigarettes on their reservations and purchase them for their own use or consumption within such reservation). Hence, tribal members apparently cannot, for example, give untaxed cigarettes as gifts to other tribal members, and they clearly cannot smoke or take them off their reservations.

All of these provisions go far beyond recording and reporting cigarette sales made to tribal members and amount to direct regulation of those sales unauthorized by any act of Congress and contrary to decisions of this Court. In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), this Court invalidated the application of a state sales tax on sales made to reservation Indians. The Court held the traders statutes, 25 U.S.C. §§ 261-264, part of the historic "comprehensive federal regulation" of trade on Indian reservations, preempted the state law. 380 U.S. at 686 and 688. Specifically, the Court stated:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens. . . .

Id. at 690.

Subsequently, the Indian traders statutes have been held to preempt a variety of state taxes on reservation commercial transactions and activities. *E.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) (motor carrier license and fuel use taxes as applied to non-Indian logging company operating on reservation); *Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980) (transaction privilege tax of on-reservation sale of tractors to Indian enterprise); *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982) (tax on gross receipts of non-Indian construction company received from tribal school board for construction of school on reservation).

Taxation is merely a form of regulation and the traders statutes themselves do not speak in terms of how a state may regulate, they speak to whether the state may regulate and they say it may not. As this Court stated in *Central Machinery*:

> [W]e held in Warren Trading Post by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject. . . . ' Until Congress repeals or amends the Indian traders statutes . . . we must give them 'a sweep as broad as

> [their] language . . . ' and interpret them in light of the intent of the Congress that enacted them.

448 U.S. at 165-66 (citations omitted); *accord Colville,* 447 U.S. at 155-56 ("The Indian traders statutes incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange").

Moreover, this Court has held state regulation of tribes in Indian country to be preempted in cases where taxation was not involved or was involved along with other regulations. In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), a state sought to apply its gambling laws to tribal reservation bingo games. The Court found no federal statute authorizing the state's asserted jurisdiction and therefore noted that the "[d]ecision in this case turns on whether state authority is preempted by the operation of federal law. . . . " 480 U.S. at 216.

The Court in *Cabazon* found the applicable tribal and federal interests there to be "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," as well as promotion by federal agencies of tribal bingo under various federal laws and programs. 480 U.S. at 216-19.[5] These "compelling federal and tribal interests"

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[5] Similarly, other federal statutes and programs likely support Indian cigarette sales. *See* Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1304 (10th Cir. 1989), *aff'd in part and rev'd in part,* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)

preempted the state laws. *Id.* at 221-22; *see also Moe*, 425 U.S. at 480-81 (vendor license fee on reservation Indian business held preempted); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. ___, 113 S.Ct. 1985 (1993) (motor vehicle registration fee on tribal members in Indian country held preempted).

Under the traders statutes and these cases the State regulation of cigarette sales to tribal members in Indian country here is preempted. Once federal preemption of an activity is found, the inquiry is over. All state regulation is prohibited, since there is "no room" for it. *Warren Trading Post*, 380 U.S. at 690. On this point the New York Court of Appeals was absolutely correct. There is no need to reach the minimal burden question with respect to state regulation of reservation cigarette sales to tribal members because there is no room for any burdens.

B. State Regulation of Cigarette Sales to Tribal Members In Indian Country Infringes on Tribal Self-Government

The State's asserted regulation of intra-tribal trade in Indian country also must fail because it infringes on the right of Indian tribes to self-government. Infringement on tribal self-government is an independent barrier to the application of state law to tribal members in Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-43. This Court has long recognized that state law may not infringe "on the right of reservation Indians to make

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(tribal convenience store selling cigarettes was constructed with federal funds).

their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

State regulation of cigarette sales to tribal members in Indian country would clearly interfere with significant tribal and federal interests, including the Indian sovereignty and immunity doctrines and the congressional goal of tribal self-government, especially the "overriding goal of encouraging tribal self-sufficiency and economic development." *See Potawatomi*, 498 U.S. at 510.

The quota in particular would adversely affect tribes that both sell cigarettes and tax those sales because it would limit their potential sales revenues and tax revenues. Even where tribes do not tax, the quota would restrict potential sales revenue available to support the operation of tribal governments and the delivery of governmental services. The quota could also limit private revenues and employment opportunities in retail sales, thereby contributing to unemployment and poverty in Indian country. The other regulations on tribal members as retailers and consumers present obvious further intrusions on "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. at 220.

If the State here were taxing the cigarette sales to tribal members it could not do so under *Moe*, *Potawatomi*, and other cases of this Court, *e.g.*, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (Indian tribes and their members are "per se" exempt from state taxation in Indian country unless Congress provides otherwise). *A fortiori* the State cannot regulate these sales. Indeed, the very nature of non-taxing regulations may present more of a threat to tribal self-government. Dual taxation of

non-members in Indian country has been upheld in part because taxpayers can be subject to different sovereigns. *E.g., Colville*, 447 U.S. at 152-53 (state and tribal cigarette taxes); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state and tribal oil and gas severance taxes). But, as the Court has recognized, compliance with dual regulatory schemes is much more difficult, if not impossible. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (landowner cannot comply simultaneously with tribal and county zoning and land use regulations); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (denying state authority to regulate hunting and fishing by non-members on a reservation concurrently with tribe).

State regulation of sales of cigarettes to tribal members in Indian country simply cannot be reconciled with tribal self-government and self-determination.[6] Hence, the decision below must be affirmed at least with respect to the application of the state regulations to sales of cigarettes to tribal members.[7]

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[6] Where federal and tribal interests have preempted a field, there is no balancing of the state's interest. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. ___, 112 S.Ct. 683 (1992). In such cases states may only regulate tribal members in Indian country with express congressional authorization. *Id.* at 692.

[7] *Amici* express no opinion on the issue of whether the unlawful regulation of cigarette sales to tribal members invalidates the entire state cigarette tax scheme. And, because we are convinced that the federal preemption and infringement doctrines govern the decision in this case regarding state regulation of sales to tribal members, we do not address the issue of whether the state laws and regulations here impose undue burdens under *Moe* and *Colville*.

II. IN CASES WHERE A TRIBE HAS ENACTED ITS OWN ENFORCEMENT SCHEME OR ENTERED INTO A COMPACT WITH A STATE WHICH ADDRESSES THE COLLECTION AND REMITTANCE OF VALID STATE TAXES ON CIGARETTE SALES TO NON-MEMBERS IN INDIAN COUNTRY, THE APPLICABLE PRESUMPTION SHOULD BE THAT SUCH TRIBAL LAWS AND COMPACTS PREEMPT THE STATE'S ENFORCEMENT SCHEME

A state's interest in regulating the activities of non-members in Indian country must be weighed against the relevant tribal and federal interests. *Colville*, 447 U.S. at 156-57; *accord White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-45. The issue of the State's regulation of cigarette sales to non-members in Indian country here should be considered in light of a tribal interest apparently not present in the record in this case, but which nevertheless is pertinent to the ultimate reach of this decision – one which will affect all of Indian country. That interest relates to the exercise of tribal governmental powers in compliance with *Moe* and *Colville*.

Several *Amici* tribes have enacted codes and ordinances which govern taxation and regulation of cigarette sales to members and non-members in Indian country.[8]

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[8] *E.g.*, Chapter 2, Cheyenne-Arapaho Tribes of Oklahoma General Revenue and Taxation Act of 1988, Ordinance No. 8118003 (Apr. 27, 1988); Confederated Salish and Kootenai Tribes of the Flathead Nation Tax Exempt Sales Ordinance, No. 94A (Sept. 28, 1993); Sisseton-Wahpeton Sioux Tribes Codes of Law, Chapter 10, Retail Business Tangible Personal Property Sales Tax Act (Feb. 5, 1986) and Chapter 12, Tribal Tobacco Outlets and Excise Tax (May 4, 1982).

Amici are aware of other tribes which have similar regulations. Some *Amici* have entered into compacts with states which govern cigarette tax collection and enforcement in Indian country.[9] *Amici* are aware of a growing number of other tribes which have entered into similar agreements.

Where such tribal regulations or compacts address the collection and remittance of valid state taxes on cigarette sales to non-members, there is no need for a state unilaterally to impose additional requirements. In instances where there was no finding of such a tribal system, this Court has approved a rebuttable presumption that a state may impose "minimally burdening" collection and recordkeeping requirements on tribes and Indian retailers. *Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 159-60. *Colville* in particular recognizes that a tribe may rebut the presumption by showing that the asserted state requirements are not reasonably necessary as a means of preventing fraud. 447 U.S. at 160.

This Court should now acknowledge that if there is a tribal scheme, adequate accountability is presumed and the burden is on the state to show that accountability is lacking. Hence this Court should clarify that tribal laws and compacts defeat the presumption that a state may

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[9] *E.g.*, Agreement Between the Shakopee Mdewakanton Indian Community and the Department of Revenue of the State of Minnesota Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 1988); Agreement Between the Stockbridge-Munsee Tribe and the Department of Revenue of the State of Wisconsin Related to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 1988).

impose even minimal burdens on tribes and Indian retailers in Indian country.

Otherwise, this Court will be sanctioning a presumption that tribes will be dishonest or incompetent, which is wholly unwarranted as a blanket rule for Indian country. In other contexts this Court has rejected arguments that such general attacks on tribes are justifiable. *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion [of tribal remedies] requirement" established in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342 n.27 ("We reject the State's claim that the Tribe's ability to manage its wildlife resources suffers from a lack of enforcement powers and therefore concurrent jurisdiction is necessary to fill the void").

The Court has recognized that Congress has spoken to this issue as well. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923, state and federal courts "must defer to the experience, wisdom, and compassion of the [] tribal courts to fashion an appropriate remedy" for tribal children). These cases and statutes teach that tribes are to be trusted in the first instance and the burden is on the state or non-Indian party to prove otherwise.

This Court recently suggested that tribes and states may work cigarette tax issues out together to their mutual satisfaction. *Potawatomi*, 498 U.S. at 514. Similar encouragement and flexibility is warranted in this case as well.

The fact that many tribes have developed tribal laws and have negotiated compacts with states aptly demonstrates these issues can be worked out at the local level. *See* Brief of *Amici* States of Washington, *et al.* in Support of Petitioner at 20 ("Consistent with the Court's suggestion in *Potawatomi*, a number of states and tribes have sought, with some success, to negotiate compacts for the collection and distribution of cigarette taxes. . . . Other negotiations in the area of cigarette taxes and motor vehicle fuel are continuing").

III. IN CASES WHERE CIGARETTE SALES ARE AN INCIDENTAL ASPECT OF A LARGER, RESERVATION-BASED TRIBAL ECONOMIC DEVELOPMENT PROJECT, TRIBAL INTERESTS MAY OUTWEIGH STATE INTERESTS IN TAXING NON-MEMBER CIGARETTE PURCHASES

Sales of cigarettes in Indian country today are vastly different from when this Court decided *Moe* and *Colville*. Such sales do not always occur at "smoke shops." They may occur at grocery stores or other establishments at which cigarettes are but a minor or insignificant item in the overall business operation. More and more often, cigarette sales in Indian country take place at tribal casinos, bingo halls, resorts, lodges, sports and recreation facilities, and other major economic development projects initiated and maintained by tribes. *See, e.g., Cabazon*, 480 U.S. at 205 (tribal bingo halls and card clubs); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 327 (tribal hunting and fishing resort complex); *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) (tribal sporting, recreational, and cultural facilities consisting of lake

marina, automobile race tracks, and performing arts amphitheatre).

Many non-members visit these tribal enterprises, some for significant periods of time, not because they can buy untaxed cigarettes, but because they want to enjoy the benefits of the tribal economic development project. Non-members may purchase cigarettes while they are enjoying the benefits of the tribal project. But their primary purpose for entering and being in Indian country is other than to buy cigarettes.

In short, contrary to the views of the State's supporting *Amici* in this case, non-members are not always attracted to Indian country solely because of cheap cigarettes, and sales of cigarettes to non-members in Indian country are not always tantamount to the sale of a tax exemption. Moreover, when they are in Indian country, non-member visitors as well as non-member employees of the tribal project are entitled to and do receive significant services provided by tribes, such as police and fire protection, ambulance and emergency medical services, roads, water, and other public utilities, and tribal judicial systems.

Where sales of cigarettes to non-members are an incidental and relatively minor aspect of an overall tribal project, and where the non-member is the recipient of significant tribal services, the state may have little, if any, interest in taxing the non-member cigarette purchases. And there may be other preemptive and infringement forces at work. In *Cabazon*, the Court expressly distinguished *Colville* and stated the following:

Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

> . . . The tribal bingo enterprises are similar to the resort complex featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation. . . . The Mescalero project generates funds for essential tribal services and provides employment for tribal members. We there rejected the notion that the tribe is merely marketing a tax exemption from state hunting and fishing regulations. . . . Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.

480 U.S. at 219-20. In *New Mexico v. Mescalero Apache Tribe*, the Court had found the "concerted and sustained" undertakings of the tribe there to develop its reservation economy were "far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*." 462 U.S. at 341.

States cannot tax or regulate these tribal economic enterprises directly. *Id.*; *accord Cabazon*, 480 U.S. at 220-21; *see also* the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(4) (states cannot impose taxes, fees, or charges on tribes engaged in gaming). State taxes on cigarette

sales incidental to these enterprises may be prohibited as well. *See Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding state sales taxes on tribal bingo enterprise and related activities, including food services for patrons and sales of bingo supplies and accessories, preempted by federal law).

CONCLUSION

For the reasons stated above, the decision of the New York Court of Appeals should be affirmed.

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Respectfully submitted,

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